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No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MELVIN D. REUBER,

Petitioner,

v.

FOOD CHEMICAL NEWS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the *New York Times* "actual malice" standard immunize a media defendant which consciously avoided the truth, had actual knowledge of some falsity, and wholly abandoned all responsibility for accurately reporting the news?

2. Does the Court's definition of a "public figure" cover a research scientist with little media access whose voluntary involvement in a particular public controversy is slight, and who is defamed by a media defendant which did not publish in the context of that public controversy but instead to expose a private employment dispute between the individual and his employer?

3. Does the First Amendment bar an invasion of privacy judgment based on a media defendant's publication of a false, leaked, and highly sensitive letter from a confidential personnel file?

4. May an appellate court reviewing verdicts for libel and invasion of privacy make its own credibility and factual findings in conflict with the jury's verdict on the actual malice and invasion of privacy issues, disregard a District Court's factual findings on the public figure issue, and review jury instructions and procedural questions by giving media defendants privileges unavailable to other litigants?

PARTIES TO THE PROCEEDINGS

Petitioner and respondent were the only parties to this case in the United States Court of Appeals for the Fourth Circuit. Various other persons unaffected by the judgment below were parties in separate consolidated appeals severed from this one when in was reheard in banc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Melvin D. Reuber petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The *in banc* opinion of the United States Court of Appeals for the Fourth Circuit (App. A, *infra*, 1a-38a) is reported at 925 F.2d 703 (4th Cir. 1991). The panel opinion of the United States Court of Appeals for the Fourth Circuit (App. C, *infra*, 41a-84a) is reported at 899 F.2d 271 (4th Cir. 1990). The opinion of the United States District Court for the District of Maryland (App. E, *infra*, 87a-119a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, 39a-40a) was entered on February 5, 1991. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. *Facts.* In 1976 petitioner began working as a pathologist at Litton Bionetics, Inc. ("Litton"), a private research firm operating the Frederick Cancer Research Center ("FCRC") under contract to the National Cancer Institute ("NCI"). On March 26, 1981 Michael Hanna of Litton wrote and placed in petitioner's confidential personnel file a scathing letter of reprimand asserting petitioner committed numerous acts of professional misconduct, such as misrepresenting his research and evading scientific review procedures (App. 47a, 66a, 175a).[1] The original letter was delivered to petitioner in an envelope marked "PERSONAL" and "CONFIDENTIAL", and copies were sent to certain persons at Litton and NCI (App. 7a).

Petitioner testified in detail at trial that numerous allegations against him were false (J.A. 1634-45). Hanna was unable at trial to defend any of his allegations of misconduct or dishonesty (J.A. 1824-1908). For example, the letter quotes petitioner as effectively admitting he did not send certain scientific articles through the FCRC review system because they were scientifically unsound (App. 177a). Hanna admitted he knew instead that petitioner told him he

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[1] "App." references are to Appendices A to I, *infra*, pp. 1a-184a. "J.A." references are to the Joint Appendix filed in the Court of Appeals. Petitioner has requested that the Clerk of the Court of Appeals send one copy of Volumes I to IX of the Joint Appendix to this Court for filing.

did not send those articles through the FCRC system because he was told it did not apply to those articles (J.A. 1885-87). NCI and Litton personnel stated that petitioner's understanding of this review system was correct (J.A. 1796-97). Hanna testified that his *only* intended criticism was thyat petitioner used his office instead of home address on certain manuscripts (J.A. 1824, 1826, 1828-29), a criticism nowhere explicitly alleged in the letter (App. 175a-179a). Hanna's predecessor testified he approved petitioner's use of his office address on these articles (J.A. 1802-03, 2712).[2]

A copy of the letter was leaked by an unknown person to William Hollis of the National Agricultural Chemicals Association ("NACA"), who in turn gave a copy to Jack Wise of Stauffer Chemical Co. On April 13 or 14, 1981, Wise gave the letter to Catherine Cooper, editor of the Pesticide and Toxic Chemical News ("News"), which respondent owns (App. 7a). Cooper promised Wise confidentiality at least twice, and knew of no one besides Hanna, petitioner and Wise who had the letter (App. 139a). Cooper was an experienced reporter who knew of petitioner and had heard nothing negative about his work or professional reputation (App. 123a, 131a, 156a).

Cooper admitted the following at trial. She read the letter carefully, and understood it was a "devastating attack" upon petitioner and the strongest reprimand letter she had ever seen (App. 155a, 141a). She had no knowledge that any of the statements in it were true, and never formed a belief that they were true (App. 174a, 165a). She knew that Hanna was the Director of FCRC, but knew nothing about his professional competence or whether he

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[2] Even on this point Hanna admitted it was permissible for petitioner to use his office address in a footnote instead of the by-line (J.A. 1890); and that the journal decides where the address belongs (J.A. 1829-30).

was a scientist or manager (App. 164a-165a). Cooper understood she had a duty to report stories fairly and accurately, and a duty to investigate whether allegations which might seriously effect someone's professional reputation were true or false before printing them (App. 126a-127a). Cooper made no effort to telephone petitioner or Hanna, the source of the charges, and made no inquiries or investigation whatsoever (App. 142a-143a).

Cooper made a "conscious, knowing decision not to inquire" into the letter's truth or falsity before publishing (App. 165a, 150a). She did not care at all whether the charges were true or false (App. 151a). She could have published the letter if persuaded that several of the statements in it were false, and probably would have published the letter even if persuaded that "every statement" in it was false (App. 153a-154a). Cooper believed that false statements about petitioner were "news" (App. 151a-152a). Cooper considered the letter newsworthy, and published it, "because it was extremely critical" of petitioner's work (App. 154a). But she would not even "think of" publishing grave charges against a chemical company without first investigating them (App. 128a, 167a).

Hanna's letter contains apparent inconsistencies on two sets of charges against petitioner.[3] On one set of inconsistencies, Cooper testified she understood Hanna was

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[3] The letter criticizes petitioner for "mishandling of scientific data and your unrestrained interpretations of those data" but later states "[y]ou may be correct in your interpretations" and are a "good pathologist...." (App. 175a, 178a). It criticizes petitioner for "gain[ing] easy and immediate voice to the media" then later states "the rest of the scientific community, and the public, has not had the advantage or privilege of learning or evaluating your view...." (App. 178a).

"contradicting himself" about the quality of petitioner's work (App. 157a); she later changed this testimony (App. 157a-160a). On the other set, Cooper testified Hanna "may or may not" have been making fundamentally inconsistent charges (App. 164a).

Cooper admitted she did not publish the reprimand letter to influence, or in the context of, a public controversy which developed in California in late 1980 and early 1981 over whether malathion should be sprayed to eliminate the Medfly (App. 147a, 5a).

In its April 15, 1981 edition the News published an article, along with a headline that petitioner was *"CENSURED . . . for 'unprofessional' conduct, misinterpreting data"*, which quoted extensively from the reprimand letter and summarized the rest (App. 180a-184a). Cooper tried to copy the letter as completely as she could (App. 152a). Petitioner first discovered the letter was leaked when he learned of the News' article. Because of the publication, petitioner resigned from Litton on the advice of his doctor. He was unable to obtain full time employment in his field for several years, sometimes earning less than $3,000 per year, and suffered extensive emotional and medical injury. See A. 48a.

B. *Proceedings Below.* 1. After seven years of pre-trial proceedings, the case was tried before a jury in the United States District Court for the District of Maryland (Joseph C. Howard, Judge) for some thirteen days. The District Court ruled petitioner was a private, not public, figure and instructed the jury accordingly. The jury found the News acted with "actual malice," and was liable for defamation and invasion of privacy. It awarded petitioner $625,000.00 in compensatory damages, and $250,000.00 in punitive damages (App. 51a-52a).

The District Court denied respondent's motion for judgment notwithstanding the verdict and wrote an opinion. It rejected respondent's sufficiency of the evidence arguments both on their merits, and alternatively because they were not raised at the close of all the evidence with the specificity required by F.R.Civ.P. 50(a) (App. 88a-89a, 95a-99a). Relying on, *inter alia, Hutchinson v. Proxmire,* 443 U.S. 111 (1979), the District Court concluded that petitioner was a private figure. It also ruled that because Cooper admittedly did not publish the reprimand letter in the context of the California controversy, respondent could not use that controversy in an attempt to make petitioner a public figure (App. 113a).

Judge Howard made certain findings of fact. He found that in December 1980 petitioner declined to get involved in an attempt to enlist him in the California malathion controversy (App. 115a). He also found:

> "At bottom, Dr. Reuber mailed his manuscript to [an environmental group] before the controversy, gave one interview to a reporter that called him, and sent a letter which was mailed to only two people. Also, of the hundreds of articles appearing on this topic, Dr. Reuber was mentioned in two." (App. 118a).

The District Court's findings were supported by Charles Perrotta, a California County attorney involved in the events, who stated that petitioner "in no way attempted to inject himself" into the California controversy and that petitioner and his paper "had a minimal effect, if any, on [its] outcome" (J.A. 2374-75, 2381; 1235-36; 1254-55).

2. A unanimous panel of the United States Court of Appeals for the Fourth Circuit affirmed. Senior Judge Winter wrote the opinion. After independently reviewing the evidence, the panel concluded it was sufficient to

support a finding of "actual malice" because respondent "wholly abandoned all responsibility for accurately reporting the news", and made "a conscious and deliberate decision to avoid learning the truth." (App. 59a, 60a n.16). Since its ruling on actual malice entitled petitioner to both compensatory and punitive damages for defamation even if he were a public figure, the panel did not decide the public figure issue (App. 61a-62a).

The panel affirmed the judgment for invasion of privacy. It held that the evidence supported a jury finding that respondent publicized private facts in a highly offensive manner about an issue not of legitimate public concern; and that petitioner's state law privacy rights protected by §652D, *Restatement (Second) of Torts* (1981), were therefore abridged. The panel held the privacy verdict did not violate the First Amendment on alternative grounds. First, even if the "actual malice" standard were applicable to petitioner's privacy claims, petitioner met *that* standard. *Cf., Hustler Magazine v. Falwell,* 485 U.S. 46, 56 (1988) (App. 72a). Second, the societal interest in free expression does not outweigh petitioner's interest in privacy in this case; respondent published information from petitioner's confidential personnel file in a newspaper catering to the industry most involved in petitioner's field of study to initiate a "general attack on his credibility" (App. 70a, 73a).

The District Court instructed the jury that "actual malice" exists when a person publishes a statement "with knowledge that it is false or with reckless disregard for its truth or falsity"; borrowing language from *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 155 (1967) (plurality opinion), the instruction also stated that actual malice "may" be established if the jury found the News engaged in "extreme departures" from responsible journalistic practices (App.

16a-17a). On appeal respondent made no direct challenge to this instruction, and petitioner claimed, *inter alia*, that respondent waived any proper objections. Apparently recognizing the waiver, respondent argued only that evidence of extreme departures from normal journalistic practices is wholly irrelevant to the actual malice inquiry The panel, relying on *Harte-Hanks Communications, Inc., v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678, 2694-2695 (1989), rejected this argument (App. 59a-60a).

3. The Court of Appeals granted rehearing in banc, and reversed by a vote of 7 to 4. Judge Wilkinson wrote for the majority. It "assume[d], without deciding" that the Hanna letter was partially false (App. 8a). The majority decided initially that petitioner was a public figure. Deeming him a "self-styled whistleblower" (App. 4a), the majority concluded petitioner had access to effective channels of communication because he served as a witness for a government agency in the early 1970s, gave an interview during the malathion controversy to one California reporter who called him, and had published many scientific papers (App. 9a-10a). It decided petitioner voluntarily entered the California controversy to influence it because he sent a copy of his malathion paper to an environmental group in California at its request, which that group then disseminated widely, and to an attorney (App. 11a-12a). Although the paper was sent to the group before there was any California controversy, the majority believed that even "involuntary" participants can become public figures by choosing a path which invites public attention (App. 12a-13a). The majority also was unpersuaded by Cooper's admission that she clearly did not publish her article in the context of the California controversy (App. 147a). It rejected efforts to focus on the subjective intent of the publisher in favor of an objective inquiry into whether any

reasonable observer "could conclude" the publication related to the controversy (App. 14a).

On the public figure question, the majority made its own *de novo* review of the facts. It neither reversed any of the District Court's findings as clearly erroneous, nor accepted them as binding. For example, the majority found that "Reuber's findings on malathion were discussed in numerous television, newspaper, and radio reports" (App. 10a), while the District Court found that of the hundreds of articles on the subject petitioner's name was mentioned in only two, and his voice did not appear on television (App. 116a-117a and n.4).

The majority began the actual malice inquiry by relying on a "fair report privilege" having constitutional implications (App. 18a). It believed such a privilege goes to the heart of the media's ability to report to citizens about what their government is doing (App. 18a). It ruled that respondent was entitled to the benefit of at least a conditional privilege which, while not conclusive on the issue, made a finding of actual malice more difficult (App. 23a).

Turning to the evidence, the majority held it was insufficient as a matter of law to establish actual malice. It asserted it would make an independent review of the record on this point, without revisiting jury credibility determinations or findings of fact (App. 23a). The majority concluded that Cooper's testimony that she made a "conscious decision" not to inquire into truth, and would have published the letter even if persuaded it was false, was insufficient to prove actual malice. It relied on *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968), which it considered "remarkably similar" to this case (App. 27a), as establishing that a failure to investigate "does not in itself establish bad

faith"; and found Cooper's testimony of limited relevance because petitioner had to show respondent published with a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (App. 29a).

The majority also found insufficient Cooper's testimony on the internal inconsistencies in the letter. It stated it would consider this testimony under the "independent review" standard mandated by *Harte-Hanks, supra*. It then decided that "[i]n reality" Cooper's testimony "harmoniz[ed]" the allegedly inconsistent statements in Hanna's letter (App. 31a); and that respondent had no apparent reason to question the truthfulness of the Hanna letter, much less any actual knowledge of some falsity (App. 28a, 31a).

The majority ruled that evidence that respondent failed to consider the potential impact on petitioner's reputation if the publication was false, that it published to cater to chemical industry readers at the expense of petitioner's reputation, and that the chemical company employee who gave Cooper the letter in confidence had a strong incentive to harm petitioner's reputation, neither singly nor in combination with all other evidence, permitted a finding of actual malice (App. 24a-27a). It believed that a contrary conclusion would transform the *New York Times* standard to the detriment of free expression and "impose wholly unprecedented burdens on news organizations" (App. 32a).

The majority reversed the judgment for invasion of privacy. Relying on its conclusion that petitioner was a public figure, it held that the public's right to know the contents of the confidential reprimand letter outweighed petitioner's interest in keeping it private. It limited its privacy holding to those like petitioner "who by nature of

their activities become public figures" (App. 36a).

The majority also ruled, without addressing petitioner's waiver argument, that a new trial would be required in any case because the District Court's jury instruction, which contained language from the plurality opinion in *Butts,* was erroneous as a matter of law (App. 16a-17a).

Judge Wilkins, writing for himself and three other judges, voted to affirm on the panel's opinion (App. 38a).

REASONS FOR GRANTING THE WRIT

A divided *in banc* Court of Appeals has decided several important questions, often in conflict with decisions of the Court and other Circuits.[4] The majority has significantly broadened the reach of the *New York Times* doctrine, invoking the First Amendment further to displace state libel law. Its conclusion that deliberate avoidance of the truth, and even evidence of actual knowledge of some falsity, cannot support a jury finding of actual malice conflicts with *Harte-Hanks,* and places major and unjustified obstacles in the path of defamation plaintiffs, without serving any legitimate First Amendment interest. The majority has added a new element to the actual malice standard, applying a "fair report" privilege in a manner rejected by other Circuits. The majority also has expanded the "public figure" concept to embrace almost any private

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[4] The in banc vote was 7 to 4. Senior Judge Winter and District Judge Harvey, who sat on the panel, did not participate in banc. Before Judge Howard tried this case and wrote an opinion, Judge Flannery of the District of Columbia and (then Magistrate and now) Judge Smalkin of Maryland wrote opinions denying respondent's original and renewed summary judgment motions. Thus 9 of the 16 judges who have ruled on the actual malice issue sided with petitioner.

individual with some voluntary or involuntary contact with a matter of general interest to the public, who now must prove actual malice to recover compensatory damages for libel. Equally important is the majority's conclusion that the widespread publication of a false and leaked reprimand letter from a confidential personnel file cannot support a verdict for invasion of privacy. The majority decided the actual malice issue, and several others, only after a *de novo* review which resolved subsidiary factual issues by viewing the evidence in the light most favorable to respondent.

I. THE "ACTUAL MALICE" DECISION BELOW RAISES IMPORTANT ISSUES AND CONFLICTS WITH DECISIONS OF THE COURT AND LOWER COURTS.

A. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), required evidence that the defendant "entertained serious doubts as to the truth of his publication" to support a finding of actual malice. This formulation has been repeated in subsequent decisions. *E.g., Harte-Hanks, supra*, 109 S.Ct. at 2696. But in these cases the defendant testified it published *believing* the charges to be true; and the plaintiff had to prove otherwise. As *St. Amant* explains:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." [390 U.S. at 732].

In *Harte-Hanks* the newspaper conducted an extensive investigation, and a jury inferred actual malice over the newspaper's vigorous protestations of belief in truth. 103 S.Ct. at 2690-2693. In affirming the finding of actual malice,

the Court found significant the newspaper's failure to interview the person supposedly most knowledgeable about the allegations, and stated (without dissent):

> "Although failure to investigate will not alone support a finding of actual malice, see *St. Amant*, 390 U.S. at 731, 88 S.Ct., at 1325, 1326, the purposeful avoidance of the truth is in a different category." [*Id.* at 2698].

If the trier of fact can find actual malice over a defendant's testimony that it believed its publication to be true, *a fortiori* it can make that finding when the defendant *admits* it did not form a belief the publication was true, because it chose to consciously avoid the truth, would have published the letter even if persuaded it was false, and more (App. 165a, 153a-154a). The decision below departs from *St. Amant, Harte-Hanks*, and similar cases, by eliminating altogether the requirement of journalistic good faith.

B. The majority's decision does violence to the balance struck by the Court between the societal interest in a vigorous press and the individual's interest in protecting his or her good reputation. It tips the balance almost entirely against the individual and gives media defendants a virtually foolproof actual malice defense. Upon learning of allegations which make grave damage to reputation apparent, newspapers will be free to intentionally not investigate, and then publish on the ground that false allegations, like true ones, are newsworthy. The most intentionally irresponsible, who totally avoid any inquiry into truth or falsity, thereby gain the maximum protection from liability, by insuring they do not discover evidence which could support a finding of actual malice.

While the majority's decision damages the individual's interest in reputation, it does not further any legitimate First Amendment interest. "The First

Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The actual malice defense goes a long way toward protecting speech that matters, by insulating the publishers of falsehoods who act with a minimum of good faith. But it has not, and should not, protect newspapers which publish falsehoods after consciously avoiding the truth. The majority's ruling gives media defendants yet another immunity which no minimally responsible publisher needs and an irresponsible publisher acting in bad faith should not have.

The Court has made clear that "there is no constitutional value in false statements of fact." *Gertz, supra*, 418 U.S. at 340. As *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) explains:

> "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."

The majority stands this basic principle on its head by immunizing a media defendant which admits, *inter alia*, it published because it believed falsehoods are "news" worthy of widespread dissemination (App. 151a-154a). Such immunity is fundamentally inconsistent with *Harte-Hanks, Cantrell v. Forest City Publishing Co.*, 419 U.S. 244, 252-253 (1974), *Butts*, and every lower federal or state case which found a triable issue of "actual malice" for publishing falsehoods.

C. The Court has made clear that the interests served by state libel law are significant. *E.g., Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2708 (1990), quoting *Rosenblatt v. Baer, 383 U.S. 75, 93* (1966) (Stewart, J., concurring) (libel

action "'only hope for vindication or redress'" law gives to the defamed); *Hustler Magazine, supra,* 485 U.S. at 52 (libel damage not easily "repaired by counterspeech"); and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974). The majority was instead convinced that this libel suit was an "inappropriate[ ] . . . course of action", and that petitioner should have tried to redeem his reputation by publishing more articles in medical journals or asking the News to carry his side of the story (App. 10a).[5]

Several Circuits have recognized that actual malice may be found where there is a partial but inadequate investigation into truth.[6] The decision below conflicts by concluding actual malice cannot exist when there is a total and deliberate failure to investigate. This conflict cannot be lessened by a claim that this case involves "hot" news or facially innocent statements. Respondent received Hanna's letter at least 24 hours before its next deadline, almost 3 weeks after it was written, and knew of no one (beside

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[5] The effects of this decision already are being felt. In *Byrd v. Randi* (U.S.D.C. D.Md., C.A.No. MJG-89-636), where plaintiff claimed a publication falsely reported that he had been convicted of child molesting, the District Court originally held there was a triable issue of actual malice. Because of the majority's decision, by order dated March 14, 1991 the District Court reversed itself on actual malice and entered summary judgment for the media defendants.

[6] *E.g., Hunt v. Liberty Lobby,* 720 F.2d 631, 643 (11th Cir. 1983) (investigation "grossly inadequate"); *Fitzgerald v. Penthouse International, Inc.,* 691 F.2d 666, 671 (4th Cir. 1982), *cert. denied,* 460 U.S. 1024 (1983) ("more" authentication required); *Carson v. Allied News Co.,* 529 F.2d 206, 211-214 (7th Cir. 1976) (did nothing to verify); and *Goldwater v. Ginzburg,* 414 F.2d 324, 339 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) ("thorough" investigation needed). *See also Burger v. McGilley Memorial Chapels, Inc.,* 856 F.2d 1046, 1053 (8th Cir. 1988), and cases cited (failure to investigate important to inference of actual malice).

Wise, Hanna and petitioner) who had the letter. Any minimally intelligent layperson would see the grave defamatory potential of the letter merely by reading it.

D. Cooper testified before the jury (App. 157a):

> "Q. And did you understand when you published this letter that Hanna was contradicting himself about the quality of Reuber's work?
>
> A. Well, I read the letter and I saw both sides. Yes."

She later changed her testimony and said there was no contradiction (App. 157a-160a). Surely the jury could infer that respondent had *actual knowledge* of some falsity after hearing Cooper testify she understood Hanna was making contradictory charges, both of which could not be true; and the jury was not required to accept the disavowals which came after Cooper realized the significance of her admissions. Given her admissions, the jury was entitled to find that Cooper knew full well that the letter was false and deliberately blinded herself to its facial falsity precisely because she feared that, if she telephoned petitioner or even Hanna, she could not launch the attack she planned.

While the District Court (which observed her demeanor) specifically commented on Cooper's unreliability as a witness (App. 103a), the majority resolved credibility questions against the jury's verdict. It "harmonize[ed]" Cooper's testimony and accepted her revised version of the facts instead of her initial admissions (App. 31a). The majority concluded that Cooper's entire testimony would not support a finding of actual knowledge of any falsity, or even reckless disregard of any falsity, or even give the News any "apparent reason to question the truthfulness" of Hanna's letter (App. 30), or even require it to conduct the slightest inquiry into truth or falsity. This

disregards *Bose v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-500 (1984), under which credibility questions are not subject to *de novo* review, and *Harte-Hanks*, which requires a reviewing court to accept non-subsidiary factual conclusions necessarily decided by the jury which are fairly supported by the evidence.

The proper scope and nature of appellate review in cases where actual malice is found -- or when that issue is decided on a summary judgment motion -- is a recurring question of importance to libel litigants which the Court should further clarify.

F. The common law recognizes a privilege to publish fair and accurate reports of official proceedings or public meetings. Section 611, *Restatement (Second) of Torts* (1977) (hereafter *"Restatement"*). It extends to matters such as "reports of judicial proceedings," *Rushford v. New Yorker Magazine,* Inc., 846 F.2d 249, 254 (4th Cir. 1988), or open public meetings, *cf., Greenbelt Cooperative Publishing Ass'n. v. Bresler,* 398 U.S. 6, 13-14 (1970). Hanna's confidential reprimand letter was not a report, was not official,[7] and was intensely private. Equally important, this privilege is defeated by a showing of actual malice, *Steer v. Lexleon,*

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[7] Although the majority repeatedly implied the contrary, it never has been disputed that both petitioner and Hanna were employees of Litton, a private corporation, and not NCI. NCI officials well understood this point. When asked about petitioner in early 1981, they stated that he "has not been an NCI employee.... He is currently a Litton employee at the Frederick Cancer Research Center" (P. Trial Ex. 13). The notion that employees of government contractors like Litton are federal employees likely would come as major news to the NCI and other agencies of the United States, which is liable under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 *et seq.*, for the negligence of its employees. *See* n.10, *infra*, p. 25. The further notion that the media is privileged to publish falsehoods from any public official's personnel file is chilling.

Inc., 58 Md. App. 199, 203, 472 A.2d 1021, 1023 (1984), as the panel (App. 60a n.17) but not the majority (App. 22a-23a) recognized, and thus cannot be used to make proof of actual malice more difficult.

The common law recognizes a separate "fair comment" or opinion privilege. *See Restatement*, §566. As the Court recently explained, this privilege is limited, *inter alia*, to statements of opinion based on true facts. *Milkovich, supra*, 110 S.Ct. at 2703. Hanna's letter alleged facts, which were false.

The Second Circuit's constitutional privilege of neutral reportage was announced in *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1024 (1977); rejected by the Third Circuit as inconsistent with *St. Amant* in *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1225 (3rd Cir. 1978); and limited by Judge Friendly in *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980). It goes beyond the common law official proceedings privilege, and confers immunity even for publishing statements believed to be untrue. But to invoke it a publisher must fairly report the denials along with the charges. *Cianci, supra*, 639 F.2d at 68-69. A state court, analyzing the precedents, has concluded that such a privilege applies, if at all, "only when a public official or public figure already embroiled in a public controversy levels a false charge against a public official or figure." *DiSalle v. P.G. Publishing Co., 544 A.2d 1345, 1363 (Pa.Super. 1988).* Hanna was the obscure director of a small government contractor, not a public figure, who was involved in a confidential controversy with petitioner (until the News published the letter). Respondent did not publish an article to expose the fact that Hanna was making false charges, or even report petitioner's side of the story, but fully adopted and published the letter as truth.

The majority has bootstrapped three privileges, none of which applies here, to create a new hybrid "fair report" privilege (App. 18a-19a). It then engrafted this creation, freed from any state law restraints, onto the constitutional actual malice standard to make its proof still harder. This addition of a new element to the *New York Times* standard should not be allowed to stand without further review.

G. The majority's *sua sponte* ruling that the actual malice instruction containing language from *Butts* required a new trial raises significant issues. First, when a media defendant admits intentional disregard of falsity, the jury instruction is irrelevant, as mere "reckless disregard" of falsity exists as a matter of law. The majority's insistence on a different jury instruction requiring proof that the News "in fact entertained serious doubts as to the truth" (App. 17a), is unwarranted in this case. *See Harte-Hanks, supra,* 109 S.Ct. at 2695, quoting *St. Amant, supra,* 390 U.S. at 730 ("reckless disregard" not captured in "one infallible definition"). Second, the instruction accurately defines actual malice as knowledge of or reckless disregard of falsity (App. 16a); properly read, it correctly permitted the jury to consider extreme journalistic malpractice as evidence but not conclusive proof of actual malice. *Harte -Hanks, supra,* 109 S.Ct. at 2686. That is how respondent read the instruction when it was given (J.A. 2481). And objections to this instruction were waived.[8]

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[8] In the District Court, when respondent declined to agree to a petitioner's proposed standard form "actual malice" jury instruction, which was unobjectionable, and desired language in an instruction stating that a mere failure to investigate does not constitute actual malice, petitioner's counsel proposed additional language from Justice Harlan's plurality opinion in *Butts, supra,* 388 U.S. at 155. When this instruction was prepared in the District Judge's library, counsel for petitioner erroneously believed the language from Justice Harlan's opinion was of

H. This case presents an especially inappropriate vehicle for the creation of new media protections. "[N]ot all speech is of equal First Amendment importance." *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). The actual malice standard is inapplicable to compensatory damage claims for speech on matters of private instead of public concern. *Id.* at 761. Hanna's letter involved a private employment dispute between himself and petitioner. As in *Dun & Bradstreet,* the letter was sent to only a few individuals who were obligated by contract or statute to keep it confidential (App. 66a). Unlike federal employees, petitioner as a Litton employee was not entitled to procedural protections before the reprimand letter was written. Hanna is not a pathologist; and his criticism of petitioner's pathology would carry little weight if presented to any forum of petitioner's peers. Hanna's deliberate misquotations and other demonstrably false criticisms of petitioner would lack credence if aired in

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majority status. Had respondent objected on the ground that the language from *Butts* was of plurality instead of majority status, the instruction could have been timely amended. There was no such objection. Respondent raised the issue of journalistic malpractice by initially listing expert witnesses on the subject. The instructions were negotiated at length. Both sides made concessions. With petitioner believing all instructions were agreed, after the jury was charged and it was too late for petitioner to withdraw his concessions, respondent first objected on the limited and unsound ground that the language from *Butts* was "not applicable to this case" (J.A. 2480-81). There was no reason to require a lengthy new trial, at the behest of a defendant which the District Court characterized as sometimes "intransigen[t]" (App. 108a) and perhaps acting "to create reversible error" (App. 99a). Finally, any error occurring here was harmless. Petitioner's closing argument focused on actual knowledge or reckless disregard of falsity, referred to the *Butts* language only once, and expressly disavowed reliance on ill-will (J.A. 2417, 2438-50). The instructions as a whole were fair. The harmless error principle should apply to media defendants like other litigants.

any public or private forum where petitioner could defend himself.

The News published to 1,300 subscribers false charges made in a private proceeding which could *not* be made credibly in public. It published a letter from a confidential personnel file of a private sector employee not on any matter of apparent public concern. This type of speech hardly deserves maximum First Amendment protection.

II. THE PUBLIC FIGURE DECISION BELOW RAISES IMPORTANT ISSUES WARRANTING REVIEW.

A. Limited purpose "public figures" are non-official persons who commonly "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz, supra,* 418 U.S. at 345. To recover compensatory damages for defamation on matters of public concern, private figures need prove only negligence while public figures must prove actual malice. *See Milkovich, supra,* 110 S.Ct. at 2703-04. Public figures are held to this higher standard because they generally can defend themselves through their media access, and assume risks by voluntarily entering public controversies. To establish a plaintiff's public figure status, a defendant must (1) identify a particular public controversy, and (2) show plaintiff voluntarily thrust himself into the center of that controversy to influence its outcome. *See Gertz, supra,* 418 U.S. at 351-352. Neither requirement was met here.

As to the first, a broad general controversy, such as whether federal funds should be expended on research, or whether pesticides are carcinogenic, is insufficient. The controversy must be "particular", and it must be "public", *Hutchinson, supra,* 443 U.S. at 135. Perhaps the public

controversy in California over malathion spraying meets this test. But that is not the controversy about which Hanna wrote, or about which the News published. Hanna was not making public charges in California, but instead writing a reprimand letter in Maryland for a confidential personnel file. The controversy about which the News published was a private employment dispute between Hanna and petitioner. That private dispute cannot make petitioner into a public figure. Any different conclusion would violate the explicit admonition in *Time, Inc. v. Firestone,* 424 U.S. 448, 454 (1976), that a "public controversy" is quite different from "all controversies of interest to the public."

B. Even if the California controversy is deemed the relevant one, petitioner did not voluntarily thrust himself into its center to influence its outcome. Petitioner is a reclusive scientist who once served as an expert witness in an agency proceeding before he began working for Litton in 1976, wrote an unpublished paper on malathion well before the Medfly was discovered in California, and responded to questions posed by one inquiring reporter during the California controversy itself. Prior to the defamation petitioner never travelled to, or initiated any calls to any reporters in, California; and of the hundreds of articles on the malathion controversy respondent could find only two even mentioning petitioner's name (J.A. 2997-99).

Petitioner is more private than other persons deemed nonpublic figures by the Court. *E.g., Hutchinson v. Proxmire,* 443 U.S. 111, 134-136 (1979) (behavioral scientist who published articles and received federal funds reported in local press); *Wolston v. Reader's Digest Association, Inc.,* 443 U.S. 157, 163 (1979) (grand jury witness' criminal contempt conviction reported in 15 articles); *Time, Inc. v. Firestone, supra,* 424 U.S. at 454, n.3 (wife of industrial magnate involved in cause celebre divorce); and *Gertz, supra,* 418

U.S. at 352 (prominent attorney active in community and professional affairs who published several legal articles). The majority has inverted the holding in *Hutchinson* by concluding that, because petitioner developed a good professional reputation among a narrow circle of his scientific peers, he voluntarily made his reputation especially vulnerable to attack.

C. The considerations underlying public figure jurisprudence should require a direct connection between the controversy relied on to make a plaintiff a public figure, and the defendants's publication. *Gertz, supra*, 418 U.S. at 352 (focus is on controversy "giving rise to the defamation"), presupposes such a direct connection. Without it, media defendants can use a limited purpose public figure's voluntary involvement in a narrow controversy to make him a virtual all-purpose public figure.

Cooper's admission that she did not publish her article to influence, or in the context of, the California controversy should be enough by itself to deny respondent the benefits of a public figure ruling. The majority's contrary conclusion gives unwarranted benefits to media defendants who do not act on the assumption that a plaintiff voluntarily assumed reputational risks, or know of any public controversy in which the plaintiff is involved, but instead publish private files to launch a broad attack on his reputation. The consequence is that a far broader category of defamation plaintiffs must prove actual malice to recover compensatory damages.[9]

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[9] The majority's public figure decision contrasts with rulings in other Circuits. *E.g., Straw v. Chase Revel, Inc.*, 813 F.2d 356, 360-361 (11th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987) (magazine publisher private figure); *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632, 644-647 (8th Cir. 1986) (in banc), *cert. denied, Bagley v. IBP, Inc.*, 479

D. "[T]he instances of truly involuntary public figures must be exceedingly rare." *Gertz, supra,* 418 U.S. at 345. The majority believed that "involuntary" participants can become public figures when they choose a path which invites public attention (App. 12a). It noted, for example, that while petitioner did not widely disseminate his malathion paper, others did (App. 11a). The decision below broadens a trend in several Circuits to expand the class of involuntary public figures and make inclusion in it far more common than this Court authorized in *Gertz. See, e.g., McDowell v. Paiewonsky,* 769 F.2d 942, 949-950 (3rd Cir. 1985), and cases cited (architect); and *Dameron v. Washington Magazine, Inc.,* 779 F.2d 736, 740-743 (D.C.Cir. 1985), *cert. denied.,* 476 U.S. 1141 (1986) (air traffic controller). Under the majority's broad reasoning, virtually anyone who has done something which results in his mention in one or two newspaper articles on a lengthy controversy becomes a potential involuntary public figure.

E. Whether a plaintiff is a public figure presents a question of law, as the District Court recognized (App. 109a). The District Court considered the public figure issue several times during the trial, and wrote an opinion addressing the question at length (App. 108a-119a). Its factual findings on this issue (App. 114a-118a) were based on both the evidence presented to the jury and evidence taken outside the jury's presence. The majority totally disregarded Judge Howard's careful findings and wrote its

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U.S. 1088 (1987) (vice president meat packing company private figure); and *Kassel v. Gannett Co., Inc.,* 875 F.2d 935, 940-941 (1st Cir. 1989) (VA psychologist not public official).

own inconsistent version of the relevant facts.[10] This case also presents the issue whether in reaching a public figure ruling an appellate court is free to make its own *de novo* review of the factual record, or instead must accord a trial court's relevant factual findings their traditional deference. *See Bose Corp., supra,* 466 U.S. at 514, n.31 (clearly erroneous standard "fully applicable" to fact findings irrelevant to actual malice standard).

The Court apparently has not squarely decided a public figure issue in the twelve years since *Hutchinson and Wolston.* This is an appropriate case for providing needed guidance to all federal and state courts on this important threshold question.

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[10] Typical of the majority's freewheeling approach to the facts on all issues is its citation of *Reuber v. United States ("Reuber I"),* 750 F.2d 1039, 1057 (D.C.Cir. 1984) as showing that the reprimand decision embodied in Hanna's letter so invoked the NCI's power and prestige "as to make the decision a governmental one in perception as well as reality." (App. 20a). In *Reuber I,* petitioner argued that Litton was liable on a First Amendment *Bivens* claim because Hanna acted at the direction of NCI officials. The District of Columbia Circuit's decision in *Reuber I,* which held petitioner sufficiently alleged state action to state a First Amendment *Bivens* claim against Litton, was decided on a motion to dismiss and accepted all pleading allegations as true. The majority overlooked the fact that petitioner *lost* this claim on its merits for lack of proof. The panel, in a case earlier consolidated with this one on appeal but not reheard in banc, affirmed a grant of summary judgment against petitioner on this claim. It held that, while petitioner adequately alleged state action, he failed to produce *evidence* of state action by Litton or a conspiratorial agreement between Litton and NCI (App. 78a-79a, 83a). Despite the panel's final decision adverse to petitioner, the majority regularly treats Hanna's letter as "official" instead of private.

III. THE INVASION OF PRIVACY DECISION BELOW RAISES IMPORTANT ISSUES WARRANTING REVIEW.

A. The disposition of the invasion of privacy verdict depends, in part, on the existence of actual malice. If actual malice is shown, the First Amendment should provide no obstacle to a privacy recovery. *Cf., Hustler Magazine, supra,* 485 U.S. at 56 ("public figures . . . may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . . ."). Whether the First Amendment prohibits a non-false light privacy recovery when actual malice is proved presents a question which has not been squarely decided by the Court, but should be.

B. Even if actual malice does not exist, the Hanna letter remains false. *The Florida Star v. B.J.F.*, ___ U.S. ___, 109 S.Ct. 2603 (1989), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), all involved First Amendment protections against privacy claims based on publications which were entirely true. *Florida Star* did not decide the question whether some privacy claims for entirely truthful disclosures based on *Restatement §652D*, unlike those based on the Florida statute at issue, could coexist with the First Amendment. 109 S.Ct. at 2612. This case, which rests on *Restatement* §652D, involves a partially false publication. The issue here is whether the First Amendment prohibits making a media defendant which issues a partially false publication liable for the injury caused to a plaintiff's privacy interests. The Court has not extended *Florida Star* to publications containing falsity, and should not.

Florida Star involved a State's claim that its privacy statute served interests of the highest order, though it did not apply the statute uniformly and it inadvertently disclosed the information. This case does not involve a statute subject to an underinclusiveness challenge; but instead a right created by the common law on a case by case basis. Here the leak was not inadvertent, and respondent cannot prove it came from the government. Citing petitioner's privacy interests, the NCI refused to disclose the letter even *after* it was published by the News (J.A. 2596). If Litton or a chemical company mailed this letter to 1,300 people in petitioner's field, the First Amendment should not prevent a state law privacy recovery. No different result should obtain because the publication was by a media defendant.

C. The majority's reliance on petitioner's public figure status to invalidate the privacy verdict raises a different question, which is also important. For a libel recovery, the Court's public figure decisions draw a sharp line; anyone falling however slightly on the public figure side must prove actual malice to recover (for speech of public concern). It seems that the Court has not applied public figure law similarly to limit privacy recoveries. For privacy purposes, it may be preferable instead to adopt a test which balances the degree of a person's involvement in public activities against the extent to which the facts involved are private. The privacy interests implicated by this case are important to both public and private figures. The panel believed it could:

> "not say as a matter of law that every researcher in a private corporation or university and every bureaucrat whose work has some impact on an issue of public concern loses all privacy interests in his or her personnel file." (App. 70a).

Also presented is a question about the proper scope of appellate review in a privacy case. Although the jury was entitled to disbelieve the implausible and self-serving testimony by Hollis of NACA that he saw a copy of the letter on a government bulletin board (J.A. 2113-18), the majority relied on it (App. 34a). Under the evidence presented to the jury the only other persons (outside of Litton and NCI) who had the Hanna letter before respondent's April 15, 1981 publication were persons inside Stauffer Chemical and NACA (J.A. 2679). Other disclosures found by the majority were not made until *after* April 15 (App. 34a; J.A. 2689, 2693), when the News' publication freed them to distribute the letter. The majority found that Wise (who twice demanded confidentiality from Cooper) "planned to distribute the letter" independent of respondent's publication (App. 34a), even though Wise did not testify.[11]

D. The personnel files of federal and state employees, including those who transact the public's most important business, are made confidential by statute. The Privacy Act, 5 U.S.C. §552a; and Maryland State Government Code Ann. § 10-616(h) (1984). Personnel files are maintained on millions of federal, state and local employees, and even more millions of private sector employees. Those unlike petitioner who choose to become whistle-blowers find that charges are placed in their personnel files by some who

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[11] Citing numerous authorities (App. 95a-99a), the District Court held that respondent waived its sufficiency of the evidence arguments by not presenting them at the close of all the evidence with the requisite specificity. Although petitioner raised the waiver argument on appeal, neither the panel nor the majority passed on it. If this Court were to agree with the District Court on this point, that would present an independent basis for affirming the privacy verdict.

prefer to attack the whistleblower instead of the problem. If media defendants are given immunity freely to publish raw allegations in personnel files supplied by leakers who cover their tracks, the result will be significant. It will let the most irresponsible broadcasters declare open season on the most intensely private files.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2641

MELVIN D. REUBER,

Plaintiff - Appellee,

versus

FOOD CHEMICAL NEWS, INC.,

Defendant - Appellant,

and

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC.; VINCENT T. DEVITA, JR., National Cancer Institute, National Institute of Health; RICHARD ADAMSON, National Cancer Institute, National Institute of Health; WILLIAM V. HARTWELL, National Cancer Institute, National Institute of Health; WILLIAM PAYNE, Frederick Cancer Research Center; MICHAEL G. HANNA, JR., Frederick Cancer Research Center; JAMES C. NANCE, Litton Bionetics, Inc.; I. J. FIDLER, Frederick

Cancer Research Center; UNITED STATES OF AMERICA; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; ENVIRONMENTAL PROTECTION AGENCY,

Defendants,

THE NEWSLETTER ASSOCIATION; MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; WASHINGTON MERRY-GO-ROUND, INC.; THE WASHINGTON POST,

Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-85-2028-JH)

Argued: October 2, 1990 Decided: February 5, 1991

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, WILKINS, and NIEMEYER, Circuit Judges, sitting en banc.

Reversed and remanded by published opinion. Judge Wilkinson wrote the majority opinion, in which Judges Russell, Widener, Hall, Phillips, Chapman, and Niemeyer joined. Judge Wilkins wrote a dissenting opinion, in which Chief Judge Ervin and Judges Murnaghan and Sprouse joined.

ARGUED: Aaron L. Handleman, ECCLESTON AND WOLF, Washington, D.C., for Appellant. Raymond Donald Battocchi, COLE AND GRONER, P.C., Washington, D.C., for Appellees. **ON BRIEF:** Melissa Chappell-White, ECCLESTON AND WOLF, Washington, D.C., for Appellant. Isaac N. Groner, Walter H. Fleischer, COLE AND GRONER, P.C., Washington, D.C., for Appellee. Lee Levine, James E. Grossberg, ROSS, DIXON & MASBACK, Washington, D.C., for Amici Curiae The Newsletter Association, Maryland-Delaware-District of Columbia Press Association, Washington Merry-Go-Round, Inc.; Henry L. Baumann, Steven A. Bookshester, Washington, D.C., for Amicus Curiae National Association of Broadcasters; J. Laurent Scharff, PIERSON, BALL & DOWD, Washington, D.C., for Amicus Curiae Radio-Television News Directors Association; Jane E. Kirtley, Washington, D.C., for Amicus Curiae Reporters Committee for Freedom of the Press; Boisfeuillet Jones, Jr., Barbara P. Percival, Washington, D.C., for Amicus Curiae The Washington Post.

WILKINSON, Circuit Judge:

Melvin Reuber was employed as a scientist at a research center operated for the National Cancer Institute (NCI). While operating under the aegis of the NCI, Reuber

disseminated his own research and took other actions which created the misleading impression that the NCI had reversed its official position that the pesticide malathion was a non-carcinogen. By such actions, Reuber, a self-styled whistleblower, entered the public controversy swirling around malathion's safety. In response to Reuber's involvement, his supervisor issued a letter of reprimand which criticized Reuber for, among other things, promoting inadequate research and subverting public confidence in the NCI. A news publication received a copy of the letter and published the majority of its contents. Reuber then sued and won a judgment against the publication for defamation and invasion of privacy.

In reviewing Reuber's claims, we hold that a whistleblower is not invariably immune from public figure status and that recovery in this instance must be judged under an actual malice standard, a standard Reuber has failed to satisfy. In addition, we hold that appellant did not invade Reuber's privacy. We therefore reverse the district court's judgment.

I.

Melvin Reuber is no stranger to the scientific and political debates raging over the carcinogenicity of chemical pesticides. He began his research on carcinogens in the 1950s during his graduate training in pathology. In the early 1970s, Reuber served as a consultant to the Environmental Protection Agency on the carcinogenicity of certain chemicals, including pesticides. In this capacity, Reuber testified at EPA hearings and at a Senate subcommittee hearing. At these hearings, Reuber established himself as a scientist who frequently found pesticides to be carcinogens. At one hearing, for example, he challenged the validity of reports submitted by the chemical companies

on pesticide safety, deeming most of the reports to be "worthless."

In 1976, Reuber started work with the Frederick Cancer Research Center ("FCRC"). Litton Bionetics operated the FCRC under a contract with the National Cancer Institute ("NCI"), a public agency. At the FCRC, Reuber studied the carcinogenic effects of various chemicals. Reuber also performed independent research on his own time, often using materials and facilities at Tracor Jitco, another facility under contract with the NCI. As part of his independent research, Reuber analyzed the pesticide picloram and concluded that it was a carcinogen. He delivered his findings at a conference in Oregon in the late 1970s. At the conference, Reuber touted his abilities to accurately determine carcinogenicity. He also reported his views on the carcinogenicity of picloram in a study that environmental groups in Wisconsin utilized to oppose the use of picloram in the state.

As an additional part of Reuber's independent research, he reanalyzed bioassays testing the potential carcinogenicity of malathion, an insecticide. These bioassays had been deposited at Tracor Jitco by other scientists under contract to the NCI. These scientists had found malathion to be non-carcinogenic and reported their findings in an official NCI report. Reuber concluded, on the contrary, that malathion was carcinogenic and assembled his findings in an unpublished manuscript.

Reuber's research on malathion gained prominence during the Mediterranean fruit fly ("Medfly") infestation of California in 1980-81. State officials proposed the use of malathion to eradicate the Medfly. The question of how to eradicate the Medfly, in particular the proposed use of

malathion, engendered a significant public controversy pitting state agricultural interests against those of other groups, including environmentalists. A California environmental group began using Reuber's malathion manuscript, which it had earlier requested from Reuber, as ammunition in its battle to oppose the use of malathion. Although Reuber based the manuscript on his independent research, the address that appeared on the paper directly below Reuber's name was "NCI, Frederick Cancer Research Center/Frederick, Maryland 21701."

By affiliating his own study with the NCI/FCRC in this way, Reuber created confusion over the official NCI position on the potential carcinogenic effects of malathion. In fact, California state health officials contacted NCI to determine whether Reuber's manuscript represented the current NCI position or whether NCI adhered to the findings of its prior published study. Drs. Vernon Hartwell and Richard Adamson, two NCI executives, responded to this confusion by contacting Dr. Michael Hanna, Reuber's supervisor at FCRC and its director, and urging him to investigate Reuber's activities.

On March 26, 1981, Hanna reprimanded Reuber in a letter (the "Hanna letter") asserting that Reuber had engaged in various forms of professional misconduct: creating the impression that the NCI endorsed his independent research, engaging in inadequate research, spending excessive time away from his job, and ignoring NCI publication clearance procedures. For example, the letter states, "you have operated under the guise of the endorsement of both NCI and the . . . FCRC. These obstreperous actions have had a multi-million dollar implication, giving the impression that the NCI may be administering programs of questionable competency." On

the adequacy of research, the letter states that after reviewing the evidence, "I can only assume that your statement regarding your thorough evaluation of these slides was incorrect and misleading . . . thus raising a question of whether your interpretation is scientifically valid."

Hanna sent copies of the reprimand letter to officials at Litton and the NCI. This letter was then leaked to outside parties. How the letter leaked from its initial recipients has not been determined. In any event, on April 13, 1981 an anonymous source provided Dr. William Hollis of the National Agricultural Chemicals Association with a copy of the letter. Hollis then forwarded a copy to Jack Wise of Stauffer Chemical Company. Wise, in turn, informed Catherine Cooper, the editor of the Pesticide and Toxic Chemical News ("PTCN" or "the News"), about the letter. The PTCN is a newsletter with approximately 1,300 subscribers seeking information on pesticides and toxic chemicals. Appellant Food Chemical News owns PTCN. On April 15, 1981, Cooper published an article about the Hanna letter, essentially reprinting most of the letter's contents. It is undisputed that Wise gave Cooper an accurate copy of the Hanna reprimand and that the News reported accurately its contents. On April 24, 1981, Reuber resigned from Litton.

Reuber then filed suit in federal district court for the District of Columbia against the Food Chemical News as well as his employers and supervisors. The suit against the Food Chemical News was eventually transferred to the United States District Court for the District of Maryland and is the only one before us on appeal. The district court held a jury trial on Reuber's common law claims against the News for defamation and invasion of privacy. On the defamation count, the jury found that the News had acted

with actual malice in publishing one or more false statements about Reuber. The jury also held the News liable for invasion of privacy. It awarded Reuber $625,000 in compensatory damages and $250,000 in punitive damages.

The News appealed the district court's judgment. A panel of this circuit affirmed the judgment for Reuber. Reuber v. Food Chemical News, Inc., 899 F.2d 271 (4th Cir. 1990). The court then voted to rehear the case en banc and we now reverse the judgment of the district court. We will treat Reuber's two claims in turn, defamation followed by invasion of privacy.

II.

In assessing Reuber's defamation claim we shall assume, without deciding, that at least one of the statements in the News' account of the Hanna letter was false. We shall also assume that the falsity damaged Reuber. What remains to be determined by this court is Reuber's status as private or public figure. The court must then decide whether Reuber adequately proved his case against the News under the appropriate standard of culpability.

We hold that Reuber is a limited purpose public figure for this appeal because he voluntarily injected himself into a public controversy "in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). As a public figure, he must prove actual malice to recover either compensatory or punitive damages. In fulfilling our constitutional duty to review the record independently, we hold that Reuber has failed to demonstrate actual malice by clear and convincing evidence. Therefore, the award of damages for defamation must be reversed.

A.

To recover compensatory damages for defamation, a public official or public figure must show actual malice, while a private figure may recover under a lower standard of culpability. Gertz, 418 U.S. at 347-48. To recover punitive damages for defamation related to a matter of public concern, any party regardless of status must show actual malice under a clear and convincing evidence standard. See Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2703-04 (1990). Because the culpability standards for recovering compensatory damages depend so much upon a plaintiff's status, we must determine Reuber's status as public or private figure. This determination is ultimately one of law. Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 669-70 (4th Cir. 1982).

The News contends that Reuber is a public figure based on his participation in controversies involving the use of pesticides, especially the malathion controversy. In response, Reuber argues he is a private person who merely headed a pathology lab at FCRC and "was not known to the public at large."

In Fitzgerald v. Penthouse, this court set forth a five-factor test for determining whether a party is a public figure. 691 F.2d at 668. The first of Fitzgerald's factors asks whether "the plaintiff had access to channels of effective communication." 691 F.2d at 668. In Hutchinson v. Proxmire, the Supreme Court determined that a defamed behavioral scientist was not a public figure, in part, because his access to channels of communication was extremely limited. 443 U.S. 111, 135-36 (1979). In contrast, Reuber had significant access to channels of effective communication before and during the time the News

published the article on the letter of reprimand. Reuber had testified before the Congress and the Environmental Protection Agency and had given lectures on the health threats associated with various pesticides. In addition, Reuber's findings on malathion were discussed in numerous television, newspaper, and radio reports. Reuber also gave at least one interview to a California paper on the perils of malathion at the very height of the controversy. Perhaps most significantly, Reuber had access to important public health and scientific sources of communication. For example, Reuber had thirty-five or more published papers to his credit. He had also been mentioned in eleven articles in the News prior to its publication of the article on the reprimand letter. These are the fora where Reuber's reputation was presumably tarnished and where it could be redeemed.

The inquiry into access to channels of communication proceeds on the assumption that public controversy can be aired without the need for litigation and that rebuttal of offending speech is preferable to recourse to the courts. Gertz, 418 U.S. at 344. Reuber, however, attempted little or no rebuttal. He neither requested a retraction or correction of the News report nor sought to respond to the News' story in a subsequent issue; instead, he raced to court.

The inappropriateness of this course of action is apparent when one examines the combined second and third factors of the Fitzgerald analysis: whether the plaintiff has voluntarily assumed a role of special prominence in a public controversy by attempting to influence the outcome of the controversy. 691 F.2d at 668. These twin factors reflect a "normative consideration that public figures are less deserving of protection than private persons because

public figures, like public officials, have 'voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 164 (1979) (citations omitted). In Hutchinson v. Proxmire, the Court held that Hutchinson did not voluntarily enter a controversy over federal government accountability simply by accepting federal funding for his research. 443 U.S. at 135. Hutchinson was completely unknown to the public before Senator Proxmire presented him with the "Golden Fleece" award.

Reuber's research, again by contrast with Hutchinson's, was quite familiar to most of those involved in the public debate over the carcinogenicity of pesticides, in particular malathion. Someone who has not attracted general notoriety may nonetheless be a public figure in the context of a particular controversy covered by publications of specialized interest. See, e.g., Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1290, 1300 (D.C. Cir. 1980) (supermarket executive, whose actions were reported extensively in trade publications, was a limited-purpose public figure). As Cooper, the editor of the News, testified, Reuber had a reputation within the scientific community as someone who usually found a chemical to be a carcinogen. Moreover, Reuber described himself as "eminent" in his field. Reuber's involvement in the California malathion controversy began in late 1979 or early 1980 when he received a request from the John Muir Institute of California, an environmental group, for information on various chemicals, including malathion. Reuber sent the Institute a copy of his malathion paper. The environmental group then widely disseminated Reuber's findings on malathion. For example, the Institute included excerpts from Reuber's paper in a hand-out the group distributed at a press conference held by the state on its

Medfly eradication proposals. In addition, after California health officials learned of Reuber's research, they conducted their own study and concluded that malathion was safe. An attorney for a California county, which opposed the spraying of malathion, also requested and received from Reuber a copy of his manuscript.

Reuber argues that providing a manuscript that is used by others in a controversy does not meet the Fitzgerald requirement of voluntarily entering a controversy. We cannot accept this claim in his case. See, e.g., National Found. for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98, 101-02 (4th Cir. 1983). Under Reuber's view, one could knowingly disseminate his views to the combatants in a controversy, and then disavow public figure status when his views and credentials are vigorously challenged. We do not think the law provides the sort of artificial shield that Reuber claims, and believe the question of personal injection into a public controversy must be more particularly evaluated.

Reuber also contends that he cannot be a public figure because many of his activities related to malathion occurred prior to the discovery of the Medfly in California. We note, however, that even "involuntary" participants can be public figures when they choose a course of conduct which invites public attention. See, e.g., Clyburn v. News World Communications, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990); McDowell v. Paiewonsky, 769 F.2d 942, 949-50 (3d Cir. 1985). Reuber invited attention by authoring a study which challenged the government's conclusions that malathion, a widely used pesticide, was non-carcinogenic.

Even if Reuber's arguments accurately reflected the law, they ignore the considerable body of evidence that he

entered into the malathion controversy voluntarily. The evidence reflects an individual knowingly deploying himself on the front-lines of debate. For example, Reuber furthered the dissemination of his malathion study by referring interested parties, including a California congressman, to the John Muir Institute for copies of his study. Further, Reuber wrote a letter to the director of the California Department of Food and Agriculture and sent a copy to an official of the California Department of Public Health in early 1981 in an attempt to influence the outcome of the malathion controversy. In that letter, Reuber criticized an earlier NCI malathion study and stressed the superiority of his own scientific credentials. Reuber even included his curriculum vitae and bibliography. The letter concluded by inviting these officials to contact Reuber for further assistance.

The means by which Reuber injected himself into the malathion controversy are also significant. He circulated findings of his own malathion research with his office address attached indicating his affiliation with the FCRC and the NCI. Similarly, he wrote his letters to the California health officials on FCRC stationery and signed them "Melvin D. Reuber, MD/Head, Experimental Pathology Laboratory." Further, Reuber took issue with the position of the NCI which was funding the facilities at which he performed his research. By taking issue with the NCI in studies and letters that at the same time indicated his affiliation with the agency, Reuber not only voluntarily injected himself into the malathion controversy by vigorously promoting his own views and research, but did so in a manner that was bound to create confusion over what the official agency position was.

The fourth Fitzgerald factor analyzes whether "the controversy existed prior to the publication of the defamatory statements." 691 F.2d at 668. The News argues this requirement is easily met because in 1981, at the time the News printed the Hanna letter, people were hotly debating the use of pesticides, including malathion. As Reuber's complaint recognizes: "around the end of 1980, controversies developed in the States of California and Wisconsin, and elsewhere, over the desirability of the wide scale use of malathion and picloram."

Reuber contends, however, that the fourth Fitzgerald requirement cannot be met because the editor of the News admitted that she did not intend to publish the article in the context of the malathion controversy. Here, appellee attempts to introduce the subjective element of the author's intent into the determination of public figure status. We reject this approach in favor of the objective approach outlined in Waldbaum v. Fairchild Publications, 627 F.2d at 1293-94. Any reasonable observer examining the reprimand letter could conclude that it addressed the malathion controversy. For instance, the Hanna letter refers to the impact of Reuber's study on the California agricultural economy. More specifically, the reprimand letter refers to Reuber's correspondence with the Director of the California Department of Food and Agriculture in which Reuber challenged the credibility of the government's malathion research. The reprimand letter also refers to speeches, telephone calls, and reports Reuber made in which he challenged the competency of the government's malathion researchers. Thus, the fourth requirement for public figure status is met.

The fifth and final Fitzgerald factor addresses whether "the plaintiff retained public figure status at the

time of the alleged defamation." 691 F.2d at 668. The News published the alleged defamation at the height of the malathion controversy, several months before spraying of malathion actually began. Reuber's research was therefore still important to the outcome of the controversy.

This analysis of the Fitzgerald factors demonstrates that Reuber, unlike the defamed behavioral scientist in Hutchinson v. Proxmire, was very much a public figure in the malathion dispute. We do not say that every whistleblower is a public figure because such a broad statement would unduly chill necessary criticism of government conduct. It is true, of course, that the prospect of public figure status may chill some potential critics of government action, but the chill is no greater than it would be for any person about to enter the rough and tumble of a public controversy. The rules designed to test public figure status remain what they have always been. By classifying Reuber as a public figure we affirm that the First Amendment is a two-way street. The Amendment assumes that hard blows may be swapped in the search for just outcomes. Reuber may use his research to challenge the credibility of scientists employed by the government; but when other scientists respond by challenging his credibility and the media reports these challenges, Reuber has little right to cry foul. As a public figure, Reuber must prove actual malice to recover either compensatory or punitive damages for defamation.

B.

We thus begin the inquiry into actual malice. As a first step, we examine the jury instructions and conclude that the court erred in its instructions on the critical element of actual malice. That error alone requires a

remand, but the inquiry does not end there. We must next determine whether Reuber proved actual malice by clear and convincing evidence for if he did not, we would enter judgment for the News rather than remanding for a new trial. This determination is in turn informed by the existence of a fair report privilege on the part of the News.

1.

Appellant contends that the trial court erred as a matter of law when instructing the jury on actual malice. The court gave this instruction to the jury:

> You are instructed that actual malice exists when the person making the statement knowingly and deliberately lies or makes the statement with knowledge that it is false or with reckless disregard for its truth or falsity.
>
> It is not enough to show merely that the publisher failed to investigate the truth of the statements. A failure to estimate standing alone is not actual malice. However, a failure to follow accepted standards of journalistic practice can be considered in determining whether the element of reckless indifference is present.
>
> If you find that the News published an article whose substance makes substantial danger to reputation apparent and that it engaged in conduct which is an extreme departure from the standards of investigation and reporting normally adhered to by

> responsible publishers, the element of reckless indifference may be established.

In the first paragraph, reckless disregard is undefined. Indeed, the judge never informed the jury that reckless disregard relates to a state of mind in which a "defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Instead, the jury was informed that reckless disregard may be established by showing a departure from accepted journalistic practices. Here, the district court resurrected Justice Harlan's approach to reckless disregard stated in Curtis Publishing v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion). That approach, however, did not command a majority in Butts and "there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule, which never commanded a majority of this Court." Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2685 (1989). See also Ryan v. Brooks, 634 F.2d 726, 731 (4th Cir. 1980) (expressly recognizing that the Supreme Court has never endorsed the professional standards rule). In fact, the Harte-Hanks Court went to some lengths to reaffirm that a departure from accepted standards alone does not constitute actual malice. See 109 S. Ct. at 2684-85.

Thus, the trial court erred as a matter of law in its instructions to the jury on actual malice. When "'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground, 'the judgment must be reversed and the case remanded.'" Greenbelt Publishing Ass'n v. Bresler, 398 U.S. 6, 11 (1970) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284 (1964)). This principle should operate with special force in this case because it is not at all

unlikely that the jury rested its finding of actual malice on the impermissible ground of a departure from accepted standards. For instance, the jury foreman, during a break in deliberations, asked the court for a transcript of the testimony of "the three expert reporters who testified as experts." This testimony focused on whether the News departed from accepted journalistic standards.

2.

While the error in the jury instructions would alone mandate reversal, this cannot end our inquiry. The question remains whether to remand the cause for a new trial or to direct entry of judgment for the News.

To decide this question, we must examine whether Reuber proved actual malice by clear and convincing evidence. While the Supreme Court in Harte-Hanks did not endorse making departures from journalistic standards the determinant of actual malice, it did recognize that such standards might serve as supportive evidence for a reviewing court in its determination of this critical element of recovery. 109 S. Ct. at 2686. In this regard, we think the inquiry into actual malice may properly be informed by the existence vel non of a "fair report privilege" on the part of the News. While the sources of the fair report privilege are in some dispute, several circuits have recognized that a privilege which goes to the heart of news organizations' ability to report to citizens about their government is one with constitutional implications. See, e.g., Lee v. Dong-A Ilbo, 849 F.2d 876, 878 (4th Cir. 1988); Medico v. Time, Inc., 643 F.2d 134, 143-45 (3d Cir. 1981); Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir. 1977). A fair report privilege shields news organizations from defamation claims when publishing information

originally based upon government reports or actions. In one sense, the presence of a privilege and the absence of actual malice are separate defenses, but in another sense they are related. While it is, of course, possible that a possessor of a qualified privilege could nonetheless be acting with reckless disregard of truth, the existence of a privilege diminishes the likelihood of that occurrence.

This is so because of the premises underlying the fair report privilege. The fair report privilege is an exception to the republication rule and is designed to mitigate its harsh effects. "Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer," Lee, 849 F.2d at 878, unless, of course, the repetition is a privileged one. We recognize a fair report privilege, in part, because of the open relationship we seek to share with our own government. Id. at 879. While the news media of necessity has something of an adversarial relationship with government officials, that relationship coexists with the function recognized by the fair report privilege simply to inform citizens of what the government is doing. Government documents serve as "the basic data of governmental operations." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975). The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them. In return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document. See, e.g., Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 254 (4th Cir. 1988). Inevitably, this reduces the chances that a news organization could actually know that a government report contained false charges or could maintain serious doubts about them.

With these considerations in mind, we address whether the fair report privilege should apply to the News' article. Reuber contends that the News should not be accorded a fair report privilege because the factual predicate for the privilege, a report on a government action or document, is absent in this case. In this respect, he argues that the reprimand letter constitutes the actions of private entities, Hanna and the FCRC, rather than governmental entities. We believe, on the contrary, that the letter does qualify as official action for the purposes of a fair report privilege. The decision to discipline Reuber, and the letter embodying this decision, "invoked the power and prestige of the National Cancer Institute so as to make the decision a governmental one in perception as well as reality." Reuber v. United States, 750 F.2d 1039, 1057 (D.C. Cir. 1984). For example, the letterhead on which Hanna wrote the reprimand states that the FCRC is operated by Litton for the National Cancer Institute, a government agency. The letter also asserts that Reuber operated under the guise of the NCI. Moreover, the letter suggests that Reuber is being disciplined, at least in part, for undermining the public's trust in the National Cancer Institute. These factors together point to the presence of government action.

Reuber also contests the legal foundations for the privilege in this case. In Lee, the circuit recognized three specific rationales for the creation of a fair report privilege as applied to government actions or documents: agency, public supervision, and the public's right to information. 849 F.2d at 878. Under the agency rationale, a reporter acts as an agent for members of an otherwise preoccupied public which could, if it possessed the time, energy, or inclination, inform itself about a government report or action. Reuber argues that the fair report privilege should not shield the News because the agency rationale for the

privilege is absent in this case. He states that Hanna intended the letter to be an internal, not a public, reprimand. Consequently, members of the public could not have informed themselves about the reprimand.[1]

We need not decide in this case whether the agency rationale encompasses only those documents which the government has officially released and which the public would have immediate access to or whether it also encompasses otherwise confidential documents which someone has placed in the public domain. We do not think that the scope of the agency rationale would be dispositive here because the other two rationales for a fair report privilege, public supervision and public information, are plainly present. See, e.g., Medico, 643 F.2d at 136-42 (absence of the agency rationale is not controlling when the other two rationales are present). The public supervision rationale recognizes that news organizations play an important role in providing the public with information it needs to monitor the operations of government. The Hanna letter provides citizens with information they need to evaluate how the carcinogenic properties of various chemicals are determined and, by extension, how an important government agency, the NCI, is waging the war against cancer. The public information rationale focuses on the public's interest in matters affecting the public welfare. The Hanna letter sheds light on the malathion controversy,

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[1]While Hanna may have intended the letter as an internal reprimand, nevertheless the fact remains that numerous individuals outside the original circle of recipients saw the letter before it reached the News. For example, at least twelve people in the chemical industry received copies of the letter. One of these twelve used information in the letter to lobby an Environmental Protection Agency official. In addition, the letter was apparently posted on a public bulletin board at the EPA.

certainly an important public matter involving an impending public decision.

We wish to make plain, however, that our holding is not without limits. By recognizing a fair report privilege in these circumstances, we neither authorize employers to leak information from personnel files, nor suggest that the fair report privilege would always shield a news organization when reporting such leaked information. Instead, we hold narrowly that reporting the contents of a reprimand letter invoking the prestige of a government agency, attacking the conclusions of a well-known critic of that agency, and addressing a controversy with significant implications for public health and for economic well-being, fairly falls within the ambit of the privilege. To adopt Reuber's contrary view would be to issue a broad judicial declaration that reports of reprimands of any whistleblowers (or, for that matter, news reports of any internal memorandums critical of government agencies or operations) were not protected by the privilege, no matter how important they were to public controversies or how essential they might be to public evaluations of a public agency. We decline to depart in such a fashion from the settled law of free expression.

Whether the fair report privilege should be characterized as absolute or qualified in its relationship to actual malice has been the subject of debate. See, e.g., Medico, 643 F.2d at 143-45. We believe that the News enjoyed, at a minimum, a qualified privilege to reprint the Hanna letter and that this privilege is relevant to any appellate inquiry into actual malice. Moreover, an understanding of the privilege is critical to the context in which the report took place. Much of the justification for news reports of this nature is rooted in the purposes of the privilege; to find reckless disregard of truth in instances in

which the privilege encourages reporters to report in timely fashion on the workings of government will exact costs upon one of the basic functions of a free press. While not conclusive of the inquiry into malice, the existence of the privilege makes it more difficult for a reviewing court to conclude that a news report on government functions was published in reckless disregard of the truth.

3.

We must address finally Reuber's claim that, notwithstanding the existence of the privilege, there was evidence of actual malice. Actual malice is a subjective standard. Plaintiff must prove that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. at 280. Reckless disregard has in turn been defined as publishing with a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). The Supreme Court has stressed that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Milkovich, 110 S. Ct. at 2705 (citations omitted). In undertaking this examination, we must determine whether the record establishes actual malice with convincing clarity. We are mindful, however, that this standard of review does not transform an appellate court into a super-jury, nor does it give us free reign to revisit credibility determinations or to redetermine findings of historical fact. Harte-Hanks, 109 S. Ct. at 2699 (White, J., concurring).

This independent review of the record does, however, embody two variations from the standard practice. First,

the requirement of independent review departs from the considerable deference an appellate court normally accords to a fact-finder's determinations. See, e.g., Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 (1982). Second, the convincing clarity standard, that is the requirement of clear and convincing evidence, departs from the usual preponderance of the evidence rule governing most civil cases. Addington v. Texas, 441 U.S. 418, 423 (1979). The Supreme Court in construing the significance of a clear and convincing standard has noted: "[N]ot only does the standard of proof reflect the importance of a particular adjudication, it also serves as 'a societal judgment about how the risk of error should be distributed between the litigants.'" Cruzan v. Director Missouri Dep't of Health, 110 S. Ct. 2841, 2854 (1990) (citations omitted). Both the independent review requirement and the heightened evidentiary standard reflect the importance associated with defamation judgments. This importance stems from the crippling effect the casual award of defamation damages can have upon the freedom of the press and, indeed, upon the "free exchange of ideas" generally. Harte-Hanks, 109 S. Ct. at 2695.

We begin our review by examining the evidence which Reuber and the district court believed sufficient to establish actual malice on the part of the News. The trial court observed that Cooper never assessed the impact that reprinting the serious charges contained in the reprimand letter would have on Reuber's reputation and career. The law of defamation, of course, protects against false damage to reputation, but the falsity of charges cannot be equated with their seriousness. Controversies with a serious public impact will contain their share of serious charges, and the New York Times rule is not to be suddenly suspended for a news organization whenever the stakes run high. If

that were the case, the vitality of debate would suffer at the point when the need for information and illumination was uppermost. Nor can Cooper's alleged insensitivity to Reuber's career or reputation be the basis for recovery. There are limits to the lengths to which news organizations can be expected to go in protecting the sensibilities of one side in a public debate. The failure to protect reputation cannot alone constitute actual malice, for indeed it is inescapable to public controversy that reputations are at risk.

Here, the trial court seemed almost to infer that Cooper, by being insensitive to Reuber's reputation, harbored an ill will towards Reuber. Even if Cooper harbored ill will towards Reuber, and there is no evidence of that, the Supreme Court consistently has held that "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." Harte-Hanks, 109 S. Ct. at 2685. Accord, Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988); Garrison v. Louisiana, 379 U.S. at 73-74. In Harte-Hanks, the trial judge carefully instructed the jury that ill will and actual malice were not equivalent. 109 S. Ct. at 2685 n.7. The trial judge in Reuber's case did not similarly admonish the jury. In fact, the trial court instructed the jury that "publish[ing] an article whose substance makes substantial danger to reputation apparent" is one of two elements comprising actual malice, the other element being a departure from journalistic standards. This instruction enhanced the risk that ill will and actual malice might be confused, and that liability might be imposed on something quite different from the New York Times standard.

As additional evidence that Cooper allegedly acted with reckless disregard, the trial court noted that Cooper

never questioned whether Jack Wise, the person who gave the copy of the reprimand letter to Cooper, or his chemical company employer had a strong incentive to harm Reuber's professional reputation. Actual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest. Self-interest (and the related desire to place opposing views and persons in an unfavorable light) motivates many news sources; if dealing with such persons were to constitute evidence of actual malice on the part of a reporter, much newsgathering would be severely chilled. The fact that Wise or his employer "had a strong incentive to diminish the impact of Dr. Reuber's scientific work" cannot constitute a finding of malice. Reuber, in turn, had a strong incentive to diminish the impact of NCI's conclusions and those of his superiors who worked there, and strong incentives to disprove are what debate is all about.

Reuber also alleges that actual malice can be inferred because a profit motive drove the News to publish the Hanna letter. He characterizes the News as a mouthpiece for the chemical industry. In his view, the News published the Hanna letter to discredit Reuber, an opponent of some chemical companies, and thereby increase its standing with its chemical industry subscribers.

The News may have subscribers in the chemical industry, but it also has subscribers in academia, in public citizen and environmental groups, and in the government. The very fact that the News had printed eleven previous stories reporting Reuber's various legal activities and research efforts (often opposing the interests of chemical companies) calls into some question Reuber's contention that the News is the uncritical mouthpiece of the chemical industry. But the profit motive or the political orientation

of the News is hardly the dispositive point. The cases from New York Times v. Sullivan onward teach that evidence of a defendant printing material to increase its profits does not suffice to prove actual malice. Harte-Hanks, 109 S. Ct. at 2685. New York Times itself involved a paid advertisement. 376 U.S. at 265-66. Moreover, it is hardly unusual for publications to print matter that will please their subscribers; many publications set out to portray a particular viewpoint or even to advance a partisan cause. Defamation judgments do not exist to police their objectivity; the First Amendment presupposes that a veritable medley of opposing voices is better suited to the search for truth. See, e.g., New York Times v. Sullivan, 376 U.S. at 270 (citing United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

Reuber also contends that Cooper's attitude toward the accuracy of the allegations contained in the reprimand letter reveals her reckless disregard of the truth. For example, the trial court observed that Cooper testified that she made a conscious decision not to inquire into the truth or falsity of Hanna's allegations in the letter. Even if Cooper made such a decision, that decision does not prove actual malice under these circumstances. In St. Amant v. Thompson, 390 U.S. 727 (1968), a lower court listed as part of its rationale for finding actual malice that a political candidate had no personal knowledge of the activities of the public official he allegedly defamed during a television broadcast. Id. at 730. Instead, the candidate relied solely on the affidavit of a union member whose reputation for veracity the candidate did not know. In addition, he failed to verify the information with those in the union office who might have known the facts. Id. The Supreme Court held that this evidence, evidence remarkably similar to that relied on by the trial court in the present case, did not

prove reckless disregard. Id. The Court noted that no evidence existed indicating that the candidate was aware of the probable falsity of the union member's statements or had reason to doubt his source's veracity. "Failure to investigate," the Court emphasized, "does not in itself establish bad faith." Id. at 733.

Here, the News and its editor had no apparent reason to question the truthfulness of the Hanna letter. A presumably reliable author, the director of a federally-sponsored cancer research center, wrote the letter on official FCRC letterhead. The author characterized the allegations against Reuber as ones which "I have investigated and have found to be true." Furthermore, the source that gave Cooper the Hanna letter had provided her with reliable information previously. "Certainly where there was no reason to doubt the accuracy of the sources used, the failure to investigate further, even if time was available, cannot amount to reckless conduct." Ryan v. Brooks, 634 F.2d at 733.

The trial judge also relied on Cooper's testimony that she would have published the Hanna letter even if she had known some of the allegations were false as evidence of reckless disregard. Cooper stated, for example, that she would print the article even if some of the allegations were false because it would be newsworthy that the director of a federally funded cancer research center was leveling false charges at his employee, an eminent cancer researcher. The Hanna letter might further show, even if part or all of it was false, that the government was attempting to muzzle a critic of its policies on carcinogenic pesticides. In that case, Cooper appears to contend that the First Amendment would protect the News when it fulfilled its obligation to

inform the public about an event of indisputable significance.

We need not debate the merits of that view, however, because Cooper's testimony is of limited relevance. Actual malice means a defendant published a story with a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. at 74. Cooper's response to a hypothetical question on whether she would have published the article even if some of the allegations were false has nothing to do with whether she had a high degree of awareness that some of the allegations actually were false. This is simply not a case where the veracity of charges is highly suspect although the headline potential of the story is apparent. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. at 157. The evidence of actual falsity in Hanna's allegations is, not surprisingly, murky and the evidence that Cooper was on notice of their probable falsity is even more remote.

Of course, false allegations add little to public debate; indeed they detract from it. See Hustler Magazine v. Falwell, 485 U.S. at 52. It would be ideal if the truth or falsity of every charge could be instantly determined by the press. Unfortunately, however, truth or falsity is often not instantly ascertainable. In the hurly burly of political and scientific debate, some false (or arguably false) allegations fly. The press, however, in covering these debates, cannot be made to warrant that every allegation that it prints is true. See, e.g., Milkovich, 110 S. Ct. at 2702-04 (tracing the evolution of defamation law away from strict liability). If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment. See,

e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772-73 (1986) (warning of the dangers of excessive media self-censorship). Prior censorship by the press of every conceivably false charge in the course of an intense public controversy also possesses dangers to the values protected by the First Amendment--dangers which in some particulars parallel those of censorship by the state.

In addition, the reality of the newsgathering process counsels against requiring the press to guarantee that every allegation on the part of a public disputant is correct. Here, the editor of the News received her copy of the Hanna letter on April 13 or 14. The News, a weekly, was scheduled for printing on April 15. Had Cooper missed the April 15 deadline, she could not have published again for a week and her readers might have been deprived of a timely report. Since the spraying of malathion had not yet occurred and its properties were still under debate, the News provided its readership with information essential to informed debate on the point. It will often be the case, of course, that investigative journalists will and should defer publication until the accuracy of charges can be determined. The law of defamation necessarily presupposes some tradeoffs in the timeliness of publication in the interests of accurate and responsible reporting. To incorporate a further guarantee of the non-falsity of every published charge during a heated public controversy is, however, to sacrifice the timeliness of news reporting to a far greater degree than New York Times allows or that the rapid-fire nature of public debate would permit. See, e.g., Hunt v. Liberty Lobby, 720 F.2d 631, 643 (11th Cir. 1983) (recognizing that standards of investigation vary with the timeliness of a news item); Ryan v. Brooks, 634 F.2d at 733 (accord). Some part of the burden for demonstrating falsity surely lies with the opposing public figures in a public

controversy -- a demonstration better made on the field of polemical battle than in a defamation suit.

Finally, Reuber points to Cooper's alleged failure to analyze two passages in the Hanna letter that Reuber considered contradictory. At one point in the letter, Dr. Hanna states: "Your mishandling of scientific data and your unrestrained interpretations" have had a significant impact on state economies as well as shaking public trust in the NCI. At a later passage in the letter, Dr. Hanna writes: "You may be correct in your interpretations, but the rest of the scientific community . . . has not had the advantage . . . of learning and evaluating your view since you declined to pass it through the standard review procedure . . . ." Reuber's counsel asked Cooper: "You would have had to know that one of the two charges Dr. Hanna made had to be false." Cooper responded, "I'm not in a position to judge that."

When examining this testimony, it is important to note that the trial court treated it as evidence of reckless disregard, but not actual knowledge of falsity. Based on this characterization, we independently review the testimony under the standard mandated by Harte-Hanks. See 109 S. Ct. at 2694-95. See also id. at 2699 (White, J., concurring) (independent review standard governs questions of reckless disregard). In this connection, the limited excerpt from Cooper's trial testimony distorts her actual response to the question of harmonizing the two statements in the reprimand letter. In reality, Cooper clearly explained that the reference to mishandling data referred specifically to data on malathion, while the second reference to interpretations being correct referred generally to Reuber's ability as a pathologist. The expectation on Reuber's part, however, that Cooper would parse the Hanna letter in detail

to determine which charges leveled by a government official on one side of a public controversy were true is exactly the type of self-censorship about which our prior discussion has forewarned. Reuber's own attacks upon the integrity of NCI research and the government's conclusions were subject to no such prior screening at the hands of the press. He can hardly expect that his adversary's response will be subjected to such screening in the interest of protecting him.

In sum, there was no actual malice here because the News did not publish with knowledge of the letter's falsity or in reckless disregard of its truth under New York Times v. Sullivan. Reuber's manifold contentions would transform the New York Times standard for actual malice into one far less protective of the purposes of free expression. His cause of action seeks to impose wholly unprecedented burdens on news organizations in the interest of conducting a one-way debate. We reject the attempt to silence one's adversaries in a public controversy by suing organizations attempting to inform the public about questions raised as to the research of every putative defamation plaintiff. Upholding this judgment would have the ironic effect of stifling debate within the community of scientists at a time when the implications of scientific research are ever more far reaching and when the public's understanding of professional credentials and conclusions must be correspondingly enhanced.

III.

Turning to the remaining claim, we must determine whether the News invaded appellee's privacy. We hold that the News did not and reverse the award for invasion of privacy.

The trial court instructed the jury that invasion of privacy is "the intrusion upon another person's solitude, seclusion, private affairs or concerns in a manner which would be highly offensive to a reasonable person . . . [or] the publicizing of true facts concerning the private life of another which are not of legitimate concern." This instruction recognizes two varieties of invasion of privacy: intrusion and publication of private facts.

A.

Appellant argues that the court erred by instructing the jury on intrusion under the circumstances. We agree, as apparently did the panel. 899 F.2d at 283 n.24. The intrusion prong of invasion of privacy requires a positive act by a defendant, aside from publication, that encroaches on a plaintiff's seclusion. See, e.g., The Florida Star v. B.J.F., 109 S. Ct. 2603, 2609-10 (1989). Here, the News simply published the Hanna letter; it is undisputed that the News played no role in leaking the letter from its initial group of recipients. Had the News or its agent unlawfully obtained the reprimand letter, this might qualify as a positive act. Id. at 2610 n.8. Yet assuming the facts most favorable to Reuber, that a government official at NCI leaked the Hanna letter in violation of government policy, this violation does not mean the News unlawfully obtained the reprimand. Id. at 2610-11. Because the News did not act to intrude on Reuber's privacy, Reuber cannot recover under that theory.

B.

To recover for invasion of privacy for the publication of private facts, a party must show that an article publicized private facts in a highly offensive manner about an issue not of public concern. Restatement (Second) of Torts § 652D

(1977); Hollander v. Lubow, 277 Md. 47, 351 A.2d 421 (1976). Initially, we must assess whether the News article publicized private facts. We note that if information is already in the public domain when published by a defendant, it does not qualify as private facts. See Hollander v. Lubow, 351 A.2d at 427-28. Similarly, the Supreme Court has recognized that a person's privacy interest in information fades when that information is present in the public domain prior to publication by a news organization. See The Florida Star, 109 S. Ct. at 2610; Smith v. Daily Publishing Co., 443 U.S. 97, 103 (1979); Cox Broadcasting Corp. v. Cohn, 420 U.S. at 494-96.

The record reflects a number of ways in which the Hanna letter was in the public domain prior to publication in the News. For example, William Hollis and Jack Wise, both employed in the chemical industry, obtained copies of the reprimand letter. Wise, in turn, gave copies of the reprimand letter to at least ten colleagues in the chemical industry. Wise and his colleagues planned to distribute the letter independent of its publication in the News. In addition, Wise used the contents of the Hanna letter in his lobbying efforts with an EPA official. Copies of the reprimand letter were apparently posted on a public bulletin board at the Environmental Protection Agency. Reuber v. United States, 829 F.2d 133, 137 (D.C. Cir. 1987). Also, Reuber had given the reprimand letter to a friend who worked at the EPA and made copies of the letter at Reuber's request. By the time of the letter's publication by the News, therefore, the reprimand letter had already been circulating both at the EPA and among industry sources.

In addition, appellant argues that Reuber has failed to satisfy the remaining two elements necessary to support his cause of action: the article was not published in a highly

offensive manner and the Hanna letter is a matter of legitimate public concern. We agree and note that Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (1979), provides guidance for our ruling. In Bilney, six University of Maryland basketball players sued the Washington Times and a student newspaper for invasion of privacy when these newspapers published stories revealing that these players were on academic probation. The basketball players claimed their academic records at the university were confidential information--a purely private matter unaffected by any public interest.

The Bilney court rejected the players' contentions by noting that "'the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that may otherwise be private.'" 406 A.2d at 659 (quoting Restatement (Second) of Torts § 652D, comment e). The news media acts unreasonably when the information published becomes "'a morbid and sensational prying into private lives for its own sake'" that offends common decency. 406 A.2d at 660 (quoting Restatement (Second) of Torts § 652D, comment h). The Maryland court held, however, that because the players "sought and basked in the limelight by virtue of their membership on the team," they could not complain when the light shined on information showing that they might have to withdraw from the team. 406 A.2d at 660.

Reuber maintains that Bilney does not control here because basketball at the University of Maryland involves a matter of public concern while the Hanna reprimand is purely a matter of private concern. The Hanna letter, however, touched not only upon the carcinogenic hazards of malathion spraying but also upon the effectiveness of the

government's fight against the scourge of cancer. Moreover, as we have already noted, Reuber sought the limelight associated with a controversy of immense public concern -- as great, some might warrant, as the fortunes of a college basketball program.

Finally, the Supreme Court's decisions on invasion of privacy counsel against accepting appellee's claim. In these cases, the Court has been presented with challenges to state statutes that effectively created causes of action for invasion of privacy if the media identified participants in certain legal proceedings or victims of certain crimes. See The Florida Star, supra; The Daily Mail, supra; Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting, supra. Crime victims, especially, are involuntary participants in the criminal justice system. Nevertheless, the Court has consistently held that the public's right to know how its law enforcement agencies and courts are performing outweighs an individual's asserted privacy interest. See, e.g., The Florida Star, 109 S. Ct. at 2607-08. Similarly, we believe that the public's right to know how its government functions in a significant public health controversy outweighs the privacy interest of a public figure who, unlike the crime victims denied recovery by the Court, voluntarily entered the controversy.

Reuber also argues that denying him recovery for invasion of privacy will mean that every bureaucrat whose work has some impact on a matter of public concern will lose all privacy interests in his or her confidential personnel file. We in no way believe that our decision will create the situation Reuber hypothesizes. The scope of our holding does not extend to "every bureaucrat"; rather our holding is limited to those figures who by nature of their activity become public figures. A researcher like the scientist

in Hutchinson v. Proxmire who was not a public figure would have a greater privacy interest in the contents of his personnel file than would a researcher, like Reuber, whose persistent efforts to enter a public controversy transformed him for the limited purposes of that controversy into a public figure.

Other measures are also available to protect a public figure's privacy that entail far fewer costs to the cause of free discussion. See, e.g., The Florida Star, 109 S. Ct. at 2609-10 (less drastic means than punishing publication are almost always available to protect privacy). When the press lacks a right of access, nothing prevents an employer or holder of confidential information from refusing to reveal it. Moreover, nothing in our decision prevents a public figure from suing his employer for leaking the supposedly confidential contents of his personnel file. Such a suit compensates the injured plaintiff and encourages employers to maintain the confidentiality of their files. Reuber, in related litigation, indeed sought relief from his employers under the Privacy Act, 5 U.S.C. § 552a(e)(6) (1982), and under state law.

IV.

The judgment of the district court awarding damages against the News for invasion of privacy and defamation imposes exorbitant costs on public debate, costs we decline to assess. To uphold Reuber's manifold claims would be to disable the government from rebutting charges by employees that the positions taken by government agencies were ill-founded, ill-motivated, or even corrupt. We think the First Amendment protects the right of persons both within and without government to challenge vigorously the conclusions of public agencies. We also think, however,

that the Amendment protects the right of the party charged with ineptitude or malfeasance to respond. Finally, we believe the Amendment protects the public's right to learn about both sides of the controversy through the press. Accordingly, we decline to uphold an award of damages that would leave only a legacy of one-sided debate.

The judgments for defamation and invasion of privacy are reversed and the case is remanded for entry of judgment for the defendant.

REVERSED AND REMANDED

WILKINS, Circuit Judge, dissenting:

For the reasons set forth in the panel opinion, Reuber v. Food Chemical News, Inc., 899 F.2d 271 (4th Cir. 1990), the jury verdict should not be disturbed. Statements in the reprimand letter received by Cooper through an anonymous source proved to be false and libelous, a conclusion supported by the record and determined to be so by the trial jury. Indifference to the falsity of these statements was demonstrated by Cooper's testimony that she "made a conscious decision not to inquire whether the statements contained in it were true or false," and would have published the letter even if she knew that some or all of the statements were false. The jury considered the evidence and found actual malice pursuant to an unexceptional charge. I respectfully dissent.

Chief Judge Ervin, Judge Murnaghan and Judge Sprouse have asked to be shown as joining in this dissent.

APPENDIX B

FILED: February 5, 1991

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 88-2641
D/CT#: CA-85-2028-JH

MELVIN D. REUBER

Plaintiff - Appellee

v.

FOOD CHEMICAL NEWS, INC.

Defendant - Appellant

and

THE NEWSLETTER ASSOCIATION; MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; WASHINGTON MERRY-GO-ROUND, INC.; THE WASHINGTON POST.

Amici Curiae

[CAPTION PORTIONS OMITTED IN PRINTING]

APPEAL FROM the United States District Court for the District of Maryland at Baltimore.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland at Baltimore, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is hereby remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this court filed herewith.

/s/ John M. Graecen
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8-2641

MELVIN D. REUBER

Plaintiff - Appellee

versus

FOOD CHEMICAL NEWS, INC.;

Defendant - Appellant

and

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC.; VINCENT T. DEVITA, JR., National Cancer Institute, National Institute of Health; RICHARD ADAMSON, National Cancer Institute, National Institute of Health; WILLIAM V. HARTWELL, National Cancer Institute, National Institute of Health; WILLIAM PAYNE, Frederick Cancer Research Center; MICHAEL G. HANNA, JR., Frederick Cancer Research Center; JAMES C. NANCE, Litton Bionetics, Inc.; I. J. FIDLER, Frederick Cancer Research Center; UNITED STATES OF AMERICA; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; ENVIRONMENTAL PROTECTION AGENCY

Defendants

THE NEWSLETTER ASSOCIATION; MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS

ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; WASHINGTON MERRY-GO-ROUND, INC.; THE WASHINGTON POST

Amici Curiae

No. 88-2642

MELVIN D. REUBER

Plaintiff - Appellant

versus

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC.; VINCENT T. DEVITA, JR., National Cancer Institute, National Institute of Health; RICHARD ADAMSON, National Cancer Institute, National Institute of Health; WILLIAM V. HARTWELL, National Cancer Institute, National Institute of Health; WILLIAM PAYNE, Frederick Cancer Research Center; MICHAEL G. HANNA, JR., Frederick Cancer Research Center; JAMES C. NANCE, Litton Bionetics, Inc.; I. J. FIDLER, Frederick Cancer Research Center; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; ENVIRONMENTAL PROTECTION AGENCY;

Defendants - Appellees

and

UNITED STATES OF AMERICA; FOOD CHEMICAL NEWS, INC.

Defendants

THE NEWSLETTER ASSOCIATION; MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; WASHINGTON MERRY-GO-ROUND, INC.; THE WASHINGTON POST

Amici Curiae

No. 88-2643

MELVIN D. REUBER

Plaintiff - Appellee

versus

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC.; MICHAEL G. HANNA, JR., Frederick Cancer Research Center; JAMES C. NANCE, Litton Bionetics, Inc.; I.J. FIDLER, Frederick Cancer Research Center;

Defendants - Appellants

and

VINCENT T. DEVITA, JR., National Cancer Institute, National Institute of Health; RICHARD ADAMSON, National Cancer Institute, National Institute of Health; WILLIAM V. HARTWELL, National Cancer Institute, National Institute of Health; WILLIAM PAYNE, Frederick Cancer Research Center; UNITED STATES OF AMERICA; U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; ENVIRONMENTAL

PROTECTION AGENCY; FOOD CHEMICAL NEWS, INC. Defendants

THE NEWSLETTER ASSOCIATION; MARYLAND-DELAWARE-DISTRICT OF COLUMBIA PRESS ASSOCIATION; NATIONAL ASSOCIATION OF BROADCASTERS; THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; WASHINGTON MERRY-GO-ROUND, INC.; THE WASHINGTON POST

Amici Curiae

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-85-2028-JH; CA-82-910-JH)

Argued: October 30, 1989 Decided: March 20, 1990

Before WILKINS, Circuit Judge, WINTER, Senior Circuit Judge, and HARVEY, Chief United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Senior Judge Winter wrote the opinion, in which Judge Wilkins and Judge Harvey joined.

Frances E. Kanterman, Leonard E. Cohen (FRANK, BERNSTEIN, CONAWAY & GOLDMAN, on brief); Aaron L. Handleman (Melissa Chappell-White, LAXALT, WASHINGTON, PERITO & DUBUC, on brief) for

Appellants. Raymond Donald Battocchi (Isaac N. Groner, Walter H. Fleischer, COLE AND GRONER, P.C., on brief); Gerald P. Greiman (GREEN, HOFFMANN & DANKENBRING; Roger C. Spaeder, Leslie A. Blackmon, ZUCKERMAN, SPAEDER, GOLDSTEIN, TAYLOR & KOLKER; Alphonse M. Alfano, BASSMAN, MITCHELL & ALFANO; E. Grey Lewis, MCDERMOTT, WILL & EMERY, on brief) for Appellees. (Lee Levine, James E. Grossberg, ROSS, DIXON & MASBACK; Henry L. Baumann, Steven A. Bookshester; J. Laurent Scharff, PIERSON, BALL & DOWD; Jane E. Kirtley; Boisfeuillet Jones, Jr., Barbara P. Percival on brief) for Amici Curiae.

WINTER, Senior Circuit Judge:

These consolidated appeals raise myriad issues, but the principal ones concern the law of defamation and invasion of privacy.

I. Introduction

In 1981 the plaintiff Melvin Reuber worked for Litton Bionetics, Inc. (Litton), a private research firm, as a pathologist researching the potential carcinogenic effects of various chemicals.[1] Litton operated the Frederick Cancer Research Center ("FCRC") under a contract with the National Cancer Institute ("NCI"), a public agency. In addition to his official duties, Reuber performed a substantial amount of independent research on his own time. He used his access to data from other NCI studies to produce his own evaluation of the results.

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[1] We treat Litton Industries, Inc., and its subsidiary, Litton Bionetics, Inc,., as one entity for the purposes of this appeal.

As part of his private research, Reuber had reanalyzed bioassays concerning the potential carcinogenic effects of the chemical malathion (an insecticide). An official NCI report concluded that the bioassays did not show the chemical to cause cancer, but Reuber's independent work led him to believe that malathion might be carcinogenic. He reported this result in an unpublished manuscript. A California environmental group, which had previously requested a copy of the manuscript from Reuber, began using the paper in its opposition to the use of malathion in combatting the infestation of Mediterranean fruit flies ("Medflys") in 1980-81. While the paper was based on Reuber's private work, he had placed his office address on the manuscript, which indicated that he was associated with the FCRC and the NCI.[2]

The use of the malathion manuscript created some confusion over the official NCI position on the potential carcinogenic effects of the insecticide and prompted inquiries. As a result, Drs. Vernon Hartwell and Richard Adamson, two NCI executives, contacted Dr. Michael Hanna, Reuber's supervisor at Litton, and urged him to investigate Reuber's activities. After consulting with a number of NCI and Litton employees, Dr. Hanna convinced Reuber to mail errata letters to journals that had published papers based on his private research to clarify that they were not official FCRC or NCI reports.

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[2]Reuber's other contact with the Medfly controversy in California consisted of responding to a reporter's questions over the phone and sending a private letter to the Director of the California Department of Food and Agriculture Richard Rominger. In the letter, Reuber explained why the department should place more weight on his results than those of the official NCI report.

Hanna believed that he should also impose a sanction on Reuber. On March 26, 1981, Hanna wrote a scathing letter of reprimand (the "Hanna letter") in which he asserted that Reuber had committed the following professional misconduct:

1. knowingly and wrongly bypassing FCRC/NCI clearance procedures when publishing papers and circulating manuscripts based on his independent research,

2. admitting that he bypassed those FCRC/NCI clearance procedures because the papers were of insufficient quality to merit approval,

3. either lying about the extent of his research on the chemical malathion or spending too little time analyzing the results to support scientific conclusions,

4. spending an excessive amount of time away from his work, and

5. using the name of the FCRC and the NCI without authorization.

Hanna sent the letter of reprimand to Reuber with copies to James Nance and Dr. Fidler at Litton and Drs. Adamson, DeVita, Hartwell and Payne at NCI. Reuber has been unable to prove who leaked the Hanna letter to the outside, but it is clear that Dr. William Hollis of the National Agricultural Chemicals Association received a copy

of the letter from an anonymous source on April 13, 1981.[3] Hollis sent a copy to Jack Wise of Stauffer Chemical Company. Wise contacted Catherine Cooper, the editor of the Pesticide and Toxic Chemical News ("PTCN").[4] On April 15, after making "a conscious decision not to inquire into whether the statements contained in [the letter] were true or false," Cooper published an article about the reprimand, reproducing most of the contents of the Hanna letter.

Reuber resigned from Litton on April 24, 1981, on the advice of his physician. He has not found regular employment in his field of study since that time.

In 1981 Reuber filed suit in the District of Columbia against the United States, the Department of Health and Human Services ("HHS"), and the Environmental Protect ion Agency ("EPA") based on the Privacy Act and the Federal Tort Claims Act. Reuber also sued Food Chemical News (the "News"), Litton Industries, Inc. and its subsidiary Litton Bionetics, Inc., four individuals employed by the NCI ("NCI employees"), and three employees of Litton ("Litton employees") for violations of his rights under the First and Fifth Amendments to the U.S. Constitution and for violation of his common law rights against defamation, invasion of privacy, conspiracy, breach of contract, negligence, interference with business and contractual relationships, and

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[3]Some evidence exists that a copy also appeared on an EPA bulletin board.

[4]The publication is owned by the defendant Food Chemical News.

intentional and/or negligent infliction of emotional distress.[5]

The district judge severed Reuber's claims against the government, dismissed the First and Fifth Amendment claims against the government, and held a bench trial on the Privacy Act claims in 1984. Reuber lost most of these claims, and, on appeal, the District of Columbia Circuit held that the district court should have granted summary judgment against Reuber on all of his Privacy Act claims. Reuber v. United States, 829 F.2d 133 (D. C. Cir. 1987).

The district judge also dismissed Reuber's First Amendment claims against all other defendants in 1982. On appeal, the District of Columbia Circuit reinstated Reuber's First Amendment claims against Litton and affirmed dismissal of Reuber's claims against all individual defendants for lack of personal jurisdiction. Reuber v. United States, 750 F.2d 1039 (D. C. Cir. 1984).

In 1982 Reuber filed a similar set of claims in Maryland state court against Litton and the seven individuals named in the District of Columbia suit. This suit was removed to federal court. After the decision of the District of Columbia Circuit in 1984, the District of Columbia case (except for the claims involving the United States) was transferred to the United States District Court for the District of Maryland and consolidated with the Maryland suit. These several appeals are from that consolidated action.

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[5]Reuber abandoned his Fifth Amendment claims and his breach of contract claims against all defendants, and we do not address them here.

In 1986 the magistrate to whom the case had been referred recommended granting summary judgment in favor of Litton on Reuber's First Amendment claims. While the District of Columbia Circuit had reversed the dismissal of Reuber's First Amendment claim against Litton, the magistrate ruled that the District of Columbia district court's subsequent disposition of the Privacy Act claims against the U.S. collaterally estopped Reuber from pursuing his claims against Litton. In the alternative, the magistrate also granted summary judgment against Reuber on his First Amendment claims on the grounds that the individual defendants were entitled to qualified immunity as federal officials. He held that immunity applied in this case because Reuber's First Amendment rights were not "clearly established" at the time of the alleged violation.

On the common law claims against Litton and the individuals employed by Litton, the magistrate recommended a bifurcated trial with the first part focusing on whether any Litton employees leaked the Hanna letter. The magistrate reasoned that if the Litton employees did not leak the letter, then they were entitled to immunity as federal officials acting within the scope of their authority. Reuber stipulated that he could not prove who had leaked the letter, so the common law claims against Litton and its employees were dismissed.

The district judge adopted the magistrate's recommendations and set trial for Reuber's common law claims against Food Chemical News. Litton moved for sanctions against Reuber under Rule 11, Fed. R. Civ. P., but the court denied the motion.

At the trial against the News, the judge instructed the jury on defamation and invasion of privacy. The jury

answered the following special verdict interrogatories:

> 1. Do you find that the defendant, Food Chemical News, Inc., is liable to the plaintiff, Dr. Reuber, for having negligently published a false article about him?
>
> Jury: No
>
> 2. Do you find that the News is liable to the plaintiff for having invaded his privacy?
>
> Jury: Yes
>
> 3. Do you find that the News acted with "actual malice" as the Court has defined that term for you?
>
> Jury: Yes

The jury awarded Reuber $500,000 in compensatory damages and $250,000 in punitive damages.

The parties immediately realized that the jury verdict was ambiguous. In answering the first interrogatory, the jury could have meant that (1) the letter, and thus the News article, did not contain false statements, (2) even if the letter contained false statements, the article presented a fair and accurate account of the letter, or (3) the News was more than just negligent in publishing a false article, it acted with actual malice. In response to a second set of questions, the jury specifically found that the Hanna letter and the News article contained "one or more" false statements. On the basis of this finding, the district judge entered judgment against the defendant for defamation as well as for invasion of privacy. In a third and final round of questions, the jury indicated that being told that the News

was liable for both defamation and invasion of privacy changed its assessment of compensatory damages. It then increased the compensatory damage award from $500,000 to $625,000.

The appeals consolidated for argument and decision are three in number: (1) the News appeals the judgment against it for defamation and invasion of privacy (No. 88-2641), (2) Reuber appeals the dismissal of his claims against Litton, the Litton employees, and the NCI employees (No. 88-2642), and (3) Litton appeals the denial of sanctions against Reuber under Rule 11 (No. 88-2643). We affirm the disposition of all claims, albeit for reasons different in some cases from those assigned by the district court.

II. Food Chemical News (No. 88-2641)

1. Defamation

We turn first to the claim for defamation against the News. In reviewing a defamation claim involving the First Amendment, we must "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964). We can affirm the verdict against the News only after assuring "ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." Id. Reuber may recover for defamation if the News article on the reprimand letter contained false statements of fact, the publication caused damage, and one of two things is true: (1) Reuber is a private figure and the News was at least negligent, or (2) Reuber is a public figure and the News acted with actual malice. New York Times v. Sullivan, 376 U.S. 254 (1964);

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

a. False Statements

The jury found that some of the statements in the reprimand letter and the News article were false.[6] Evidence upon which the jury could have reasonably relied shows that Reuber did not knowingly circumvent FCRC/NCI clearing procedures for his private publications as Hanna suggested. In fact, he was specifically told that he did not have to submit papers based on his private research to Litton for clearance. The letter also quotes Reuber out of context to create the false impression that he admitted his papers were substandard. In any event, the News attacks the correctness of the jury's finding that the article contained false statements on several grounds.

First, the News argues that the instructions to the jury were erroneous in that they only required a finding that "one or more statements in the article are false and derogatory." The News argues that the jury should have

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[6]The News argues that because it accurately reported the contents of the reprimand letter, it printed no false statement. It relies on the Maryland privilege to report official actions and contends that it is responsible only for accurately reporting those actions and not for the propriety of the official action itself. Even if the letter is an official action, which it may not be, this argument goes too far. Reporting the events in a trial or public hearing is a far cry from publishing the contents of a supposedly confidential personnel file. Maryland explicitly recognizes a privacy interest in personnel records. In defining public access to state records, the Maryland Code states that "a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information." Md. State Gov't Code Ann. §10-616(h) (1984).

been required to determine whether the entire article was substantially true or false. While we agree that the statements should be viewed in context, we do not find error in the jury instruction. A single false statement may support a defamation claim, regardless of the number of true statements published at the same time, unless the other statements affect the interpretation of the statement at issue. Cf. Hohman v. A.S. Abell Co., 44 Md. App. 193, 407 A.2d 794, 796-97 (1979).[7]

In this case, the judge cautioned the jury that "in determining whether such statement is false or derogatory, you must look at the article as a whole." The jury was thus properly instructed to consider the context of the article in deciding whether or not it contained false statements. Even without the instruction, the News article is direct and straightforward, and it is unlikely that the jury mistakenly read something out of context.

Next, the News contends that the district judge should have required the jury to identify which statement(s) were false.[8] Without such a specific finding, the News reasons, neither the district court nor this court can determine whether the statements relied upon by the jury were fact or opinion. While a court might have a duty to distinguish

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[7]For example, a false statement might appear in an article, but the context or additional language may indicate that the entire article is satirical. Cf. Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (denying a libel claim based on a parody of an advertisement).

[8]The News has not provided any authority supporting the proposition that a jury must specifically identify which statements are false.

carefully facts from opinions for the jury in some cases, this is not such a case. The letter consists of detailed and specific allegations of fact. To the extent that Hanna expressed his opinions, the jury was clearly instructed to consider only factual statements. In addition, the arguments of counsel at trial focused on the factual statements.[9] While the special verdict interrogatories were not models of precision, the responses by the jury suffice to show a finding that the article contained false statements of fact.

b. Actual Malice

We turn next to the jury's finding of actual malice in its response to the first set of interrogatories. Actual malice exists only where the defendant knew that the publication was false or acted with reckless disregard as to its truth or falsity. New York Times, 376 U.S. at 279-80. The district court correctly instructed the jury that the plaintiff must show actual malice by "clear and convincing" evidence. Id. at 285-86.[10] The News argues on appeal that (1) the

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[9]We note that the News never properly presented this issue to the district court. After the first response from the jury, the defendant took the position that the verdict was fatally inconsistent. When the court proposed submitting clarifying questions, the defendant put its objections on the record. Despite this opportunity to voice objections, the defendant never asked the court either to require the jury to identify which statements were false or to explain to the jury which statements were opinions. Even now, the News does not suggest any statement of opinion in the letter on which the jury may have impermissibly relied.

[10]We assume, without deciding, that the plaintiff was a limited purpose public figure and apply the actual malice standard to the determination of liability. While the district court instructed the jury on actual malice as a prerequisite only to punitive damages (because the

evidence in the record is insufficient as a matter of law to sustain a finding of actual malice, and (2) the judge improperly allowed the jury to consider deviations from standard journalistic procedures. In appraising the merits of these contentions, we must conduct our own independent evaluation of the evidence to ensure that the jury verdict does not infringe impermissibly on free expression. Id at 285.

After reviewing the record, we agree with the jury that the plaintiff showed actual malice with clear and convincing evidence.[11] Consideration of the purpose behind the actual malice standard will reveal why the defendant fails to come under its protection. False statements of fact, such as those found in the Hanna letter, do not themselves warrant constitutional protection. Rather, publication of some false statements is afforded constitutional protection in order to prevent a chilling effect on the exchange of ideas and the

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court found that Reuber was a private figure), the standard in Maryland for showing actual malice is the same whether one is a public figure seeking compensatory damages or a private figure seeking punitive damages. See Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982); Maryland Civil Pattern Jury Instructions, 12:7 (2d ed. 1984) (1989 Supp.). In both instances, the New York Times standard applies. As a consequence, the jury's finding of actual malice pursuant to a punitive damage instruction satisfies Reuber's burden to show actual malice as a public figure. In any event, the parties did not contest this issue.

[11]The district judge, who had an opportunity to observe the witnesses, found the evidence of actual malice "overwhelming."

communication of true statements of fact.[12] Under the actual malice standard, a newspaper attempting in good faith to report accurately information about public officials and public events does not have to fear punishment for mistakes which will inevitably occur.

Nevertheless, the protection granted publishers in New York Times does have limits. The First Amendment does not require that "publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." Gertz, 418 U.S. at 341. The actual malice standard provides "breathing space" for free expression, but it leaves room to protect the "legitimate state interest underlying the law of libel [which is to compensate] individuals for the harm inflicted on them by defamatory falsehood." Id. at 341-42. That interest requires individuals to refrain from publicizing information that they know is false and to avoid reckless indifference as to the accuracy of the report. Publishers who fail to meet even this minimal burden do not warrant protection under the First Amendment because they have reason to know that they should refrain from publishing the statements at issue.

We have independently reviewed the record and agree

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[12]In Gertz the Supreme Court explained that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wideopen' debate on public issues." "Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate . . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters." Gertz, 418 U.S. at 340 (citations omitted).

with the jury that the News failed to meet even the minimal burden of the actual malice standard. The editor of the PTCN, which published the letter, took no steps to ascertain the accuracy of the letter. She only knew that someone in the chemical industry, with a vested interest in discrediting Reuber, claimed to have received the letter from an anonymous source. Despite the fact that it was the most severe letter of reprimand she had ever seen, she did not telephone Reuber to get his response or even call Hanna to verify that he had actually written such a letter.[13] These actions are explained by the editor's admission at trial that she had "made a conscious decision not to inquire into whether the statements contained in it were true or false."[14] She also testified that she could have published the letter even though persuaded that several or all of the statements in it were false. In addition, the jury was entitled to consider that the PTCN was a trade newspaper with a pecuniary interest in advancing the interests of the chemical industry.[15]

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[13]Cf. Harte-Hanks, Inc. v. Connaughton, 109 S.Ct. 2678 (1989) (finding actual malice in part for a failure to contact key individuals or listen to available tapes); Curtis Publishing Company v. Butts, 388 U.S. 130 (1967) (finding actual malice in part for a failure to review notes or contact readily available witnesses to verify information).

[14]In Harte-Hanks, the Supreme Court found that evidence of an "intent to avoid the truth" could support a finding of actual malice. 109 S. Ct. at 2698.

[15]The Supreme Court has stated that "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry" (citations omitted). Harte-Hanks,

Given the admissions by the editor about her subjective intent, the evidence in the record indicates that the PTCN had wholly abandoned all responsibility for accurately reporting the news. The preservation of open and vigorous public debate does not require protecting such deliberate and callous indifference to the truth or falsity of the Hanna letter.

The News also argues that it was error to instruct the jury that it could consider departures from normal journalistic practices in assessing malice. It contends that the plaintiff must show that the defendant subjectively "entertained serious doubts as to the truth of his publication." Ryan v. Brooks, 634 F.2d 726, 732 (4 Cir. 1980) (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). While the News editor admitted to conducting no investigation, "[a]s long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict, even if a more thorough investigation might have prevented the admitted error." Ryan, 634 F.2d at 734.

The defendant incorrectly suggests these facts are irrelevant to the determination of actual malice. In our view, the jury may consider such a departure as part of its overall determination of knowledge of or reckless disregard for falsity. Harte-Hanks, 109 S.Ct. at 2686. The district court in this case explicitly pointed out that a failure to investigate, standing alone, could not support a finding of actual malice. The court then properly allowed the jury to consider departures from accepted standards of journalistic

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109 S.Ct. at 2686.

practices as evidence of the knowledge or reckless indifference of the News.[16]

The News also argues that because it accurately reported the contents of the reprimand letter, it cannot be guilty of acting with actual malice.[17] The News relies in part on Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), which reversed a defamation verdict against a newspaper.[18] In Bresler, the paper had reported the events at a tumultuous public hearing before the local zoning commission. Several speakers accused the plaintiff of "blackmailing" the city, and the newspaper reported those attacks. The Court held that "even the most careless reader

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[16]The News contends that the evidence showed no more than a mere lack of investigation. However, the judge clearly instructed the jury that a mere failure to investigate was not sufficient to find actual malice. The jury then found actual malice, and the evidence introduced at trial supports this finding. As discussed in the text, the newspaper did not just negligently fail to investigate. Rather, it made a conscious and deliberate decision to avoid learning the truth. At best, the PTCN was extremely reckless about the accuracy of the Hanna letter.

[17]The News cannot escape liability merely by claiming that it accurately reported the contents of the letter. Under the republication rule, the News is deemed to have adopted the Hanna letter as its own statement. Cf. Lee v. Dong-A Ilbo, 849 F.2d 876, 878 (4 Cir. 1988), cert. denied, 109 5. Ct. 1343 (1989). An exception exists for the reporting of official actions, such as public hearings or judicial proceedings. 849 F.2d at 878. However, it is not clear that this was an official action, and the privilege can be overcome by a showing of actual malice. Steer v. Lexleon, Inc., 58 Md. App. 199, 472 A.2d 1021 (1984).

[18]Also compare Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) (holding that the First Amendment prohibits an invasion of privacy action for publication of the name of a rape victim available on a public record).

must have perceived that the word was no more than rhetorical hyperbole." Id. at 14. Nobody thought that the plaintiff had been charged with a crime.

This case is substantially different. The article in the PTCN did not report on a public hearing or a trial. Rather the article disclosed a private letter of reprimand written by the employee of a private company. It is not at all clear that such a letter constitutes an "official action" sufficient to invoke the privilege. Even if the Hanna letter was an official action, the readers were given the impression that the charges lodged against Reuber were true, not "rhetorical hyperbole." While the media enjoys greater latitude in reporting some public events, such as trials, such latitude does not extend to this case.

c. Public Figure

The lower court found that Reuber was a private figure. This finding meant that Reuber could recover compensatory damages with a showing of negligence and only had to show actual malice to recover punitive or presumed damages. Gertz, 418 U.S. at 347. The News contends that Reuber is a public figure and may not recover anything without showing actual malice. Reuber may well be a limited purpose public figure for cancer research issues.[19] However, because we affirm the jury verdict

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[19] The News claims that Reuber was a public figure on two separate theories. First, it claims that Reuber is a "public official" by virtue of his employment at Litton and work at the FCRC. It seems fairly clear from the record that Reuber did not have "substantial responsibility for or control over the conduct of government affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). Rather, he provided a "narrowly defined professional service in a highly technical field." Arctic

finding actual malice, we need not, and do not, decide the public figure issue.

d. The Jury Verdict

After the jury answered the initial set of interrogatories, the district court realized that the responses were ambiguous. To clarify the verdict, it submitted two additional questions asking whether the letter and/or the News article about the letter contained one or more false statements. It also allowed the jury to reconsider the damage award. The jury answered both questions in the affirmative and increased the compensatory damage award by $125,000.

The News contends that this procedure erroneously allowed Reuber to recover twice for the same injury under different claims. The district judge, it argues, should not

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Co. v. Loudoun Times Mirror, 624 F.2d 518, 521-22 (4 Cir. 1980) (holding a consultant company engaged in historical and archaeological research not to be a public official), cert. denied, 449 U.S. 1102 (1981). Also compare Kassel v. Gannett Co., Inc., 875 F.2d 935 (1 Cir. 1989) (applying a three-part test to uphold a finding that a staff psychologist at the Veteran's Administration was not a "public official").

The News' second argument that Reuber is a public figure is that his involvement with the problems of carcinogens, public health, and, in particular, the malathion controversy renders him a limited purpose public figure under the standard of Gertz v. Robert Welch, 418 U.S. 323 (1974). This argument has some merit. The interest in public health hazards, such as cancer-causing chemicals in food, can be exceptionally strong as indicated by the controversy in California surrounding the use of malathion. In addition, the EPA banned several chemicals based in part on Reuber's work. Because his work has such a direct impact on public welfare, Reuber's qualifications as a pathologist may be a legitimate subject of public inquiry.

have allowed the jury to alter its damage award after answering the clarifying interrogatories about the falsity of the letter and article.[20] If the second set of questions merely clarified that the jury meant to hold the defendant liable for defamation by acting with actual malice, and not with just negligence, then the damage award from the first set of special verdict questions should not have needed revision. However, the district judge carefully worded the third set of questions submitted to the jury to avoid that problem.

It was possible that, because of the wording of the first set of questions, the jury did not realize that the News was liable for both defamation and invasion of privacy.[21] After the second set of questions clarified that the News was liable for both claims, the jury was asked if the knowledge that the defendant was liable for both defamation and invasion of privacy changed its damage determination. This question gave the jury an opportunity to say that it had not been misled and that no change in the damage award was warranted. We believe that the district judge adequately

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[20]The News asserts, but does not explain, that the defamation and privacy claims were mutually exclusive. This argument is incorrect. Defamation is publication of a false statement while invasion of privacy is revelation of a private fact. A jury could reasonably have found both in this case.

[21]The damages for invasion of privacy and defamation do not completely overlap, so the jury was entitled to change its award if it had misunderstood the defendant's liability.

resolved any ambiguity in the verdict.[22]

e. Evidence of Damage

The News asserts that Reuber failed to prove any damages. The record contains extensive evidence concerning Reuber's inability to find work, lost reputation, mental anguish, and lost earnings. The News does not dispute this evidence, but disputes that publication of the Hanna letter in the PTCN article caused these problems. It argues that Reuber's losses stemmed not from publication of the letter by Food Chemical News, but from preexisting conditions, his voluntary resignation, the issuance of the letter by Hanna, and/or his lawsuit against Litton. The News may be correct that some of Reuber's losses stem from these other

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[22]A separate question on the special verdict form for each element of each claim would have avoided this difficulty in the first place. Once the ambiguity became apparent, however, submission of supplementary interrogatories aided the district court in its duty to harmonize, if possible, potentially contradictory responses to special interrogatories. Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963).

The appellants correctly point out that a judge may not resubmit interrogatories when faced with "a decisive verdict, an unequivocal finding of no wrongful conduct by [the defendant]." McCollum v. Stahl, 579 F.2d 869, 871 (4 Cir. 1978) (finding error where resubmission of the interrogatories was "tantamount, in its effect, to a direction to the jury to find liability . . . ."), cert. denied, 440 U.S. 912 (1979). The district court in this case did not face such an "unequivocal" verdict. When an ambiguity arises, the district court may clarify the special verdict with supplemental interrogatories. Taylor v. Home Insurance Company, 777 F.2d 849, 858-59 (4 Cir. 1985) (upholding resubmission of questions to clarify damage award). See also McLaughlin v. Fellows Gear Shaper Co., 786 F.2d 592, 597 (3 Cir. 1986) (allowing resubmission under Fed. R. Civ. P. Rule 49).

causes.[23] However, we cannot say that the jury was unreasonable in finding that at least some of Reuber's damages are attributable to the article published by the News.

In addition, the News argues in its brief under seal that the district judge unfairly excluded evidence on Reuber's medical and psychological background that would mitigate damages. The defense was able to introduce extensive evidence about Reuber's past medical history. The judge excluded some evidence under Rule 403, Fed. R. Evid., because it was of marginal probative value and unduly prejudicial. On this record, we cannot say that the judge abused his discretion in excluding a limited amount of potentially inflammatory evidence.

2. Invasion of Privacy

The judge instructed the jury that invasion of privacy is "the intrusion upon another person's solitude, seclusion, private affairs or concerns in a manner which would be highly offensive to a reasonable person . . . [or] the publicizing of true facts concerning the private life of another which are not of legitimate concern." Restatement (Second) of Torts §§ 652B, 652D (1981); Hollander v. Lubow, 277 Md. 47, 351 A.2d 421 (1976). The jury found the News liable for invasion of privacy, but the News argues

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[23]The compensation awarded by the jury was substantially less than the damages claimed by Reuber. This result may suggest that the jury attributed some of his losses to sources other than the article published by the News.

that it is entitled to a judgment n.o.v. on this claim.[24] We review the question of whether a jury could have reasonably found that the article publicized private facts in a highly offensive manner about an issue not of legitimate concern.

Evidence in the record is more than ample to support a jury finding that the News article contained private facts. The administrator of a private corporation, Hanna, placed a private letter of reprimand in the personnel file of an employee, Reuber. Reuber's employment contract provides that "[c]onfidential information . . . shall not be disclosed without prior written consent of the individual, institution or organization." While this statement may suggest that either the individual or the organization could authorize disclosure, the testimony of an individual at the FCRC indicated that such information was in fact kept confidential and was not disclosed to the outside or to other employees unless necessary. The NCI later refused to produce the letter in response to a Freedom of Information Act request because it would "constitute an unwarranted invasion of the personal privacy of the addressee." Even the News' editor admitted that Reuber had a "legitimate right to feel that a confidential scathing letter of reprimand that belongs in his personnel file should not be made public."

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[24]The News points out that it did not physically intrude into Reuber's personal life or physical belongings, which is required for the tort of intrusion upon the seclusion. Restatement (Second) of Torts § 652B. However, it is clear from the evidence at trial and the arguments of counsel that the focus was on the publication of private facts. We confine our review to the publication of private facts theory. Cf. Braun v. Flynt, 731 F.2d 1205 (5 Cir. 1984 (upholding a "false light" invasion of privacy verdict against the defendant even though the judge erroneously instructed the jury on an "appropriation" theory where it was "reasonably certain" that the jury was not significantly influenced by the error.).

Given the private nature of the letter, the jury could have found that a reasonable person would be highly offended to see widespread distribution of its contents in a newspaper article. The only remaining question is whether the contents of the letter were a matter of legitimate public concern. "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community. [It is] a matter of community mores." Restatement (Second) of Torts § 652D comment h (1981). Moreover, "[s]ome reasonable proportion [should] be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given."[25]

The News contends that Reuber's employment record was a matter of public concern because he had thrust himself into the public eye by becoming involved with public health care issues. For support the News cites Bilney v. Evening Star Newspaper Co., 43 Md. App. 560, 406 A.2d 652 (1979). In Bilney, the court denied recovery for the publication of the academic standing of several members of the University of Maryland basketball team after the coach, "Lefty" Driesell, had been quoted by the Washington Post as saying that a number of players were on academic probation. The court reasoned that the information was of public concern because academic standing affected the eligibility of players on a major college basketball team. "Having sought and basked in the limelight, by virtue of their membership on the team, appellants will not be heard

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[25]For example, "[r]evelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were made concerning one who is merely injured in an automobile accident." Id.

to complain when the light focuses on their potentially imminent withdrawal from the team." Id. at 660. The court thus affirmed summary judgment for the defendants on the invasion of privacy claim.

The Bilney decision does not, however, control the outcome in this case. The existence of some legitimate public interest in an issue does not eliminate all rights to privacy held by the individual. Rather, Maryland law calls for a balancing of the public and private interests at stake. "The extent of the authority to make public private facts is not, however, unlimited . . . . Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given." Bilney, 406 A.2d at 660 (quoting the Restatement (Second) of Torts § 652D comment h). Thus the court in Bilney granted summary judgment because it found that a legitimate public interest existed and that the interest outweighed the players' privacy concerns.

Even where a tight nexus exists between the facts revealed and the public interest, the privacy interest may outweigh any legitimate public concern. For example, in Capra v. Thoroughbred Racing Association, 787 F.2d 463, 464 (9 Cir.), cert. denied, 479 U.S. 1017 (1986), the defendant had published the true identity of a family relocated under the federal witness protection program. The district court held that the information publicized was newsworthy and granted summary judgment on the invasion of privacy claim. The Court of Appeals agreed that the information was "noteworthy, if not newsworthy," but reversed and remanded. The court held that, applying a balancing test, "a reasonable jury . . . could find that the

press release was not newsworthy as to one or more of the plaintiffs.[26]

Turning to the case at hand, we agree that the public has some legitimate interest in the caliber of Reuber's work as a pathologist. We also recognize that the Hanna letter bears at least indirectly on this issue. The existence of a connection between the letter and his work as a pathologist does not, however, end the inquiry.

Maryland law requires a comparison of the public and private interests at stake, and the responsibility for striking the balance rests with the jury. We cannot say that the jury was unreasonable as a matter of law in finding that any public interest in the letter was outweighed by Reuber's interest in keeping his personnel file private.[27] To hold otherwise would virtually eliminate the right to privacy for any person doing work even indirectly relating to a public issue. Reuber was not a star player on a Division I team who "sought and basked in the limelight" of a nationally televised spectator sport. Rather, he was a laboratory researcher in a private corporation. The News did not

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[26]In Capra, the court explained that the jury should use a three-part balancing test in determining "newsworthiness." The court said that the jury should weigh: (1) the social value of the facts published, (2) the depth of the publication's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily assumed a position of public notoriety. Id. at 465. While Maryland has not formally adopted this test, the decision in Bilney reflects a concern for these three factors, particularly the voluntary assumption of a position of public notoriety.

[27]We address here only the adequacy of the record to support the "legitimate concern" element of the common law tort of invasion of privacy and not the First Amendment concerns which arise. We consider limitations imposed by the First Amendment below.

disclose Reuber's grade point average in response to ongoing public speculation about which players were on academic probation; it revealed information from his confidential personnel file to initiate a general attack on his credibility.[28] The News did not accurately report his grades; it carelessly printed a false letter of reprimand.[29] While the jury might have reasonably found that Reuber's privacy interest had not been violated, we cannot say as a matter of law that every researcher in a private corporation or university and every bureaucrat whose work has some impact on an issue of public concern loses all privacy interests in his or her confidential personnel file.[30]

Even if the letter was not of legitimate public interest under the common law right to privacy, a question remains as to whether the First Amendment interest in free expression bars recovery for invasion of privacy in this case. The News relies on the Supreme Court decision in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), to show that defendants charged with invasion of privacy receive the same protection under the First Amendment as those charged with defamation. If so, then a plaintiff may not

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[28]To the extent that a controversy existed in California over the use of malathion, the News editor admitted that she did not publish the article in the context of that controversy.

[29]One reason for keeping a personnel file confidential is that information placed in the file, such as the letter written by Hanna, is not necessarily screened for its accuracy.

[30]We note that the state of Maryland protects the personnel records of its employees from disclosure even though many, if not most, perform tasks related to matters of public interest and the personnel records would often shed light on the employees' qualifications to perform their jobs. Maryland State Government Code Ann. § 10-616(h) (1984).

recover for invasion of privacy without showing falsity and actual malice.[31] However, the Court in Cox confined its decision to the "publication of the name of a rape victim obtained from public records which themselves are open to public inspection." Id. at 491 (emphasis added). The Court expressly recognized that individuals maintain a privacy interest even in true facts that must be weighed against the societal interest in free expression.[32] As discussed above, the Hanna letter was not a public record open to public scrutiny. It was a letter written by the administrator of a private corporation about a private employee. Even if Reuber is a public figure, not all of his life is laid bare to public scrutiny. Employees of public agencies, who clearly affect public decisions, have a privacy interest in their

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[31]Applying the "actual malice" standard of New York Times to torts, such as invasion of privacy, where truth or falsity is not usually an issue requires the plaintiff to show falsity in addition to the other elements of the claim. Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) ("public figures . . . may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . . ."). Because the tort of intentional infliction of emotional distress is closely related to the tort of invasion of privacy, the Falwell decision also indicates that the 'actual malice standard may apply to invasion of privacy claims by public figures. See Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 614-15 (1990) (discussing the implications of Falwell in general and suggesting that the rationale underlying the decision may extend to invasion of privacy claims).

[32]The Supreme Court recently stated that "[n]or need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." The Florida Star v. B.J.F., 109 S.Ct. 2603, 2608 (1989).

personnel files. Congress makes an exception to the Freedom of Information Act for all "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b) (6). The jury could have reasonably found that he had a legitimate expectation not to have the letter publicized.[33]

While this case is distinguishable from Cox and others in which the Supreme Court has applied the actual malice standard,[34] we would affirm the judgment for invasion of privacy whether or not the heightened standard applies. As discussed above, the jury found that the News article contained false statements of fact and that the News acted with actual malice. Thus, Reuber would prevail under the highest standard of constitutional protection available to the defendant.

The News also contends that the reprimand letter was

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[33]This case is also distinguishable from Cox because it does not involve a judicial proceeding. In reversing a judgment against the defendant for publishing the name of a rape victim, the Court emphasized the "special protected nature of accurate reports of judicial proceedings." Cox, 420 U.S. at 492.

[34]See, e.g., Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (finding unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (striking down the indictment against two newspapers for publishing the name of a youth charged as a juvenile offender); and The Florida Star v. B.J.F., 109 S.Ct. 2603, 2608 (1989) (barring recovery for publication of rape victim's name when newspaper legally obtained information from police report). In these cases, the information published by the newspapers had been "publicly revealed" or was "in the public domain." Florida Star, 109 S.Ct. at 2610.

not private because it was already in circulation. However, the fact that one or two individuals outside Litton and the NCI had obtained the letter (or even if it had been posted on an EPA bulletin board, which was disputed) does not mean that the more extensive republication by the News could not constitute an invasion of privacy. As the Supreme Court recently noted in upholding a privacy interest in FBI rap sheets, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." Department of Justice v. Reporters Committee for Freedom of the Press, ___ U.S. ___, 109 S.Ct. 1468, 1477 (1989). By the same token, a vast difference exists between the leak of the letter to one or two individuals and the widespread publication of the letter in a newspaper catering to the industry most involved with Reuber's field of study. In short, the jury could have reasonably found that Reuber had a legitimate expectation of privacy in the letter, and its publication violated that right.

III. Litton and the Individual Defendants (No. 88-2642)

1. First Amendment Claims

Reuber filed a Bivens-type First Amendment claim against Litton and the individual defendants which the district court dismissed.[35]

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[35]While Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) dealt with the Fourth Amendment, "its logic appears . . . equally applicable to a First Amendment violation." Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 1392, 1393 (6 Cir. 1975), cert. denied, 439 U.S. 983 (1978). Cf. States Marine Lines, Inc. v.

He appeals and argues that the District of Columbia Circuit reversed the prior dismissal of his First Amendment claim against Litton and remanded for proceedings on the merits.[36]

The dismissal, he claims, violates this mandate. After the case had been remanded by the District of Columbia Circuit and then transferred to the District of Maryland, the magistrate recommended dismissal for either of two reasons. First, the subsequent D.C. district court decision on Reuber's Privacy Act claims against the U.S. and HHS collaterally estopped Reuber from litigating the First Amendment issue against Litton. Second, the individuals were entitled to qualified immunity because they did not violate any "clearly established" First Amendment rights to speak. We examine each of these reasons in turn.

a. Collateral Estoppel

The District of Columbia district court held in 1984 that Reuber "had no first amendment right to dispute NCI bioassays without either getting NCI clearance or insuring that his views would not be taken for those of NCI." If Reuber had no First Amendment right to speak in the manner described in the letter, then he would have no claim against Litton and the individual defendants. The magistrate in Maryland found that this holding collaterally estopped Reuber from pursuing his First Amendment claims against Litton and the individual defendants. On appeal,

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Shultz, 498 F.2d 1146 (4 Cir. 1974) (applying Bivens to the Fifth Amendment).

[36]Because of the procedural posture, the D.C. Circuit assumed that Reuber's allegations that Litton acted in concert with the NCI were true, so state action existed.

however, the D.C. Circuit's later disposition rendered that portion of the district court's decision unnecessary. Reuber v. United States, 829 F.2d 133, 142 (D.C. Cir. 1987). Thus collateral estoppel does not apply. See, e.g. International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858, 862 (4 Cir. 1951).[37]

The defendants have raised other collateral estoppel arguments not relied upon by the district court in dismissing Reuber's First Amendment claims. They argue that the D.C. Circuit affirmed the D.C. district court's finding that the decision to write the letter was ultimately Hanna's, a Litton employee, and was not a "determination" by NCI. Reuber, 829 F.2d at 140. This finding, they argue, indicates that Litton acted alone, so no state action exists. Defendants fail to recognize that a "determination" as used in a subsection of the Privacy Act (5 U.S.C. § 552a(e) (5)) is not a perfect synonym for "state action." Reuber's First Amendment claims only require an attempt to restrict his freedom of speech or a "thumb on the scale" of private decision-making. It is possible that NCI involvement was sufficient to constitute state action even if NCI actions did not constitute a "determination." Because the issues are different, collateral estoppel does not apply. Cf. Sine v. Local No. 992, International Brotherhood of Teamsters, 730 F.2d 964, 967 (4 Cir. 1984).

b. Qualified Immunity

The district court also adopted the magistrate's dismissal of the First Amendment claims against Litton and

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[37]The district court below acknowledged this difficulty, but appeared to rely on the alternative grounds for dismissal in the magistrate's opinion.

the individual defendants on the alternative grounds that they enjoyed qualified immunity under Butz v. Economou, 438 U.S. 478 (1978), and Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under the Harlow test:

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818.[38] The magistrate reasoned that because the D.C. district court and the D.C. Circuit had disagreed about whether Reuber had a First Amendment right to dispute NCI studies, the right could not be "clearly established," so immunity applied. Because of this holding, the magistrate found it sufficient to assume, without deciding, that state action existed.

The NCI employees provide another reason why Reuber's right to publicize his views about malathion and other chemicals was not "clearly established." His right to speak, they claim, must be balanced against the government interest in an accurate presentation of its views and in preserving its credibility. See Pickering v. Board of Education, 391 U.S. 563 (1968). The outcome of such a balancing test, they say, is not clear in advance, so Reuber's

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[38]When the D.C. Circuit remanded the First Amendment claims for proceedings on the merits in 1984, it noted that the defendants would have this qualified immunity as an affirmative defense. Reuber, 750 F.2d at 1057 n. 25.

right to speak in the manner he chose was not "clearly established."[39]

The propriety of the magistrate's holding and the arguments advanced by the defendants turn on the factual question of why Reuber was reprimanded. Reuber "alleges that he was punished because his remarks were critical of the federal government, and that is precisely the kind of speech the first amendment was designed to protect." Reuber v. United States, 750 F.2d 1039, 1065 (D.C. Cir. 1984) (Bork, J., concurring). If true, then his claim goes to the heart of the interests protected by the First Amendment, and the defendants could not have reasonably believed they were acting within their rights. Cf. Daulton v. Affeldt, 678 F.ld 487 (4 Cir. 1982) (upholding jury verdict against college for violating First Amendment in failing to rehire teacher).[40] We thus conclude that the magistrate and the district judge erred on both of the alternative grounds for granting

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[39]The Supreme Court said in Pickering that "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." 391 U.S. at 569.

[40]The NCI employees argue that Reuber failed to prove in the D.C. Privacy Act litigation that any particular individual or group of individuals was responsible for leaking the letter. This failure, they claim, should collaterally estop Reuber from relitigating the issue in Maryland. Such a holding, however, would not warrant dismissal of Reuber's First Amendment claim. The NCI employees may have violated Reuber's constitutional rights merely by encouraging Hanna to write the letter. The subsequent leak to the outside increased the damage, but would not have been necessary to establish a violation.

summary judgment on Reuber's First Amendment claims.[41]

c. Summary Judgment

While we find that the district court erred in the basis for its granting of summary judgment on Reuber's First Amendment claims, we affirm the ruling on other grounds. Reuber's allegations state a valid cause of action under the First Amendment. However, he bears the burden of proving that state action exists and that the defendants acted with an intent to suppress his substantive viewpoint. An examination of the record reveals insufficient evidence to reach a jury on either issue.

We turn first to the question of state action. The NCI employees are state actors, but the actions of Litton and its employees constitute state action only if they acted in concert with the NCI. In Blum v. Yaretsky, 457 U.S. 991 (1982), the Supreme Court held that:

> a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed

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[41]The NCI employees argue that they are entitled to judgment as a matter of law on the merits of Reuber's First Amendment claims against them. They argue that the government interest in protecting the credibility of the NCI and in avoiding an inaccurate presentation of its views outweigh any First Amendment right which Reuber may have had. This argument also turns on the factual question of why the defendants sanctioned Reuber. The NCI interests may justify some regulation of Reuber's activities, but they cannot justify deliberate suppression of substantive viewpoints to achieve consensus. As discussed below, Reuber has not provided sufficient evidence of improper motivation for the reprimand.

> to be that of the State. Mere approval of or acquiescence in the initiatives of a private party is not sufficient . . . .

457 U.S. at 1004-05 (citations omitted). The evidence indicates that Hanna discussed the situation concerning Reuber with officials at the NCI. However, nothing Reuber offers suggests that the NCI exerted control over Hanna's decision. We conclude that Reuber has alleged facts sufficient to constitute state action, but has failed to provide evidence to support those allegations. Cf. Yiamouyiannis v. Chemical Abstracts Serv., 578 F.2d 164 (6 Cir.) (upholding dismissal of a Bivens First Amendment claim for lack of evidence of state action after a prior remand on that issue), cert. denied, 439 U.S. 983 (1978).

Reuber must also show that "the content of [his] study was a factor in the government's and defendant's joint decision to penalize Reuber. If it was, the burden would shift to the defendants to show that, even absent the improper motive, the punitive action taken against Reuber would have occurred anyway." Reuber, 750 F.2d at 1059. In one sense, the content of his study was a factor. It was because his results differed from the results of the official NCI study that confusion arose and people made inquiries about the official NCI position. Hanna indicated in letters to NCI officials and to Reuber that it was those inquiries that prompted him to investigate Reuber's activities.

While the content of the study may have prompted the investigation, no evidence indicates that the content was a factor in the decision to reprimand Reuber. Hanna indicated in his letters that he was focusing his inquiry on the administrative propriety of Reuber's actions. He pointed out that Reuber may have raised a legitimate

scientific question that needed to be answered. In the actual letter of reprimand, Hanna clarified that he was "not interested in thwarting [Reuber's] efforts on behalf of public concern for environmentally mediated health problems, but rather, [sought] to channel these efforts in a legitimate manner that will gain the respect and support of all parties concerned." The evidence indicates that Hanna decided to sanction Reuber for the procedures Reuber used to disseminate his views and not for the content. Reuber asserts that the decision was based on his substantive viewpoint, but his subjective belief alone does not create a genuine issue of material fact.

Because Reuber has been unable to prove either that state action exists or that Hanna's letter stemmed from an improper motive to suppress his substantive views, Litton, the Litton employees, and the NCI employees are entitled to summary judgment in their favor on the First Amendment claims.

2. Common Law Claims

In his appeal from the grant of summary judgment in favor of the defendants on his common law claims, Reuber pursues only his claims against Litton and the Litton employees. He specifically abandons his claims against the NCI employees.[42] While Reuber has not made clear exactly which common law claims he intended to preserve on appeal, we do not find sufficient evidence for Reuber to pursue any of these claims.

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[42]Because of the Federal Employees Liability Reform and Tort Compensation Act of 1988, the United States had been substituted for the NCI employees as defendants on the common law claims.

a. Immunity

The magistrate dismissed the common law claims against Litton and the Litton employees on the basis of immunity. He reasoned that because Reuber argued in his First Amendment claim that they were acting under color of federal law (i.e. state action), he "must now bear the burden of his previous argument and cannot, for purposes of his common-law claims, maintain that these defendants are not federal actors." The magistrate erred in making this ruling.

Rule 8(e) (2), Fed. R. Civ. P., states that:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically . . . . A party may also state as many separate claims or defenses as the party has regardless of consistency. . . .

It may be true that Reuber could not prevail in both his First Amendment and his common law claims against Litton and its employees. For example, if Reuber were to win a judgment against Litton on the First Amendment claim, then he might be estopped from pursuing his common law claims. However, Reuber lost on his First Amendment claims. Moreover, the lower court assumed state action "without deciding that issue." As long as a judgment has not been issued requiring a finding that Litton and its employees were state actors, Reuber may pursue his common law claims.

b. Publication

Reuber stipulated before trial that he could not prove who leaked the Hanna letter. The defendants argue that

proving who leaked the letter is crucial to the common law claims, so they should be dismissed. Reuber responds that he may prevail on his common law claims without proving specifically who leaked the Hanna letter.[43] While he points to several valid theories, the evidence in the record does not support these contentions.

Defamation requires publication of a false statement. Reuber points out that Litton is liable for republication of the Hanna letter if such republication was the reasonably foreseeable consequence of the original distribution by Hanna. Luster v. Retail Credit Co., 575 F.2d 609, 613-14 (8 Cir. 1978). While this theory is valid, Reuber has failed to introduce any evidence suggesting that such a leak was reasonably foreseeable. Hanna placed the letter in Reuber's confidential personnel file and distributed it only to those individuals at Litton and NCI who had a working need to know the contents. The possibility that the letter could be leaked does not suffice to reach the jury on this issue. Cf. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969) (noting lack of foreseeability where contract provision prohibited republication), aff'd, 429 F.2d 31 (5 Cir. 1970).

Nor has Reuber introduced any evidence to show that Litton or the Litton employees were negligent in allowing

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[43]Litton and the other defendants argue that Reuber waived his right to object to the district court's ruling that all of his common law claims hinge on proving that Litton was responsible for making the letter public. See Fed. R. Civ. P. Rule 72(b). However, Reuber challenged the ruling that the defendants enjoyed immunity as federal actors. It was this holding that led to the conclusion that Litton and its employees would only be liable for an intentional leak. Thus, by challenging the immunity ruling, he preserved the argument for appeal.

the publication of the letter in the News article. Without such a showing, a jury cannot, as Reuber suggests, find Litton to be a joint tortfeasor who is jointly liable with whomever leaked the letter.

Reuber's last theory is that if Litton engaged in a conspiracy with NCI, then a jury could hold Litton liable for the acts of NCI officials in furtherance of the conspiracy. In this case, Reuber would only have to prove that either Litton or NCI leaked the letter. However, the same lack of evidence that precludes a finding that Litton and its employees were state actors also precludes a finding that they conspired with NCI. The evidence merely indicates that Hanna communicated with officials at the NCI. The record contains no evidence of an agreement.

While the lower court erred in applying immunity to Litton and the Litton employees as federal actors, Reuber has failed to produce enough evidence to survive summary judgment on his common law claims.

IV. Reuber: Rule 11 Sanctions (No. 88-2643)

Finally, Litton moved for sanctions against Reuber under Fed. R. Civ. P. Rule 11. Its main contention was that Reuber pressed his claims against Litton despite the fact that he had no proof that Litton had leaked the letter. The district court denied the motion without comment. Normally, this decision is reviewed for abuse of discretion. Introcaso v. Cunningham, 857 F.2d 965 (4 Cir. 1988). Litton argues that it should be reviewed de novo because the lower court gave no reasons for the denial. Under either

standard, however, we affirm the district court decision.[44] Particularly given his other claims against Litton, Reuber was entitled to conduct discovery to try to find proof of who leaked the letter. Moreover, as discussed above, Reuber had several theories under which he might have recovered from Litton without proving who leaked the letter. Thus, Reuber and his attorneys had a reasonable basis for signing their pleadings against Litton. We therefore affirm the denial of the petition for sanctions.

Litton's request to have the costs of appeal assessed against Reuber is denied for the same reasons.

AFFIRMED

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[44]Litton contends that Reuber should not have pursued his First Amendment claims against Litton after the D.C. Circuit affirmed the factual finding that Hanna acted alone, and not in concert with NCI, in reprimanding Reuber. As discussed above, the D.C. Circuit decision only decided whether NCI made an official "determination," not whether NCI had any involvement at all in the decision.

APPENDIX D

FILED: March 20, 1990

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 88-2641

MELVIN D. REUBER

Plaintiff - Appellee

v.

FOOD CHEMICAL NEWS, INC.

Defendant - Appellant

[CAPTION PORTIONS OMITTED IN PRINTING]

No. 88-2642

MELVIN D. REUBER

Plaintiff - Appellant

v.

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC. [et.al]

Defendants - Appellees

[CAPTION PORTIONS OMITTED IN PRINTING]

No. 88-2643

MELVIN D. REUBER

Plaintiff - Appellee

v.

LITTON INDUSTRIES, INC.; LITTON BIONETICS, INC.; MICHAEL G. HANNA, JR., Frederick Cancer Research Center; JAMES C. NANCE, Litton Bionetics, Inc.; I.J. FIDLER, Frederick Cancer Research Center;

Defendants - Appellants.

[CAPTION PORTIONS OMITTED IN PRINTING]

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Graecen
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELVIN REUBER :

Plaintiff :

v. : CIVIL NO. JH-82-910

LITTON INDUSTRIES, INC., et al. :

Defendants :

MEMORANDUM OPINION

Defendant Food Chemical News, Inc. moved for judgment notwithstanding the verdict ("JNOV") pursuant to Fed. R. Civ. P. 50(b), or in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59(b). (Paper #185). Plaintiff Melvin Reuber responded (Paper #187) and defendant submitted two replies. In an Order dated August 16, 1988, the Court denied the motions. This Memorandum Opinion is filed to accompany that entry.

Plaintiff brought this defamation and invasion of privacy action against defendant, alleging that defendant accomplished both by publishing a March 26, 1981 letter of reprimand written by Dr. Hanna, plaintiff's superior, and addressed to plaintiff. This case began on Monday, June 6, 1988 and ultimately concluded on Thursday, June 23, 1988. It was tried before a jury.

The jury returned a verdict in plaintiff's favor and originally assessed compensatory damages against defend ant in the amount of $500,000. (Transcript of June 22, 1988 at 6). In addition, the jury assessed punitive damages against defendant in the amount of $250,000. Id. at 7. The jury was asked to return the next day. Id. at 10. They then increased only the compensatory damages from $500,000 to $625,000. (Transcript of June 23, 1988 at 29). The Court turns to defendant's arguments.

One issue raised by defendant in attacking the verdict was that there was an "absence of any evidence to support a finding of actual malice." (Paper #185 at 18) . Accordingly, defendant requests that the punitive damages award be stricken.

Public figures who sue for defamation must prove that an allegedly defamatory statement was made with actual malice; that is, with knowledge that it was false or with reckless disregard of whether it was true or false. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Private figures must prove negligence. Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580 (1976). The Court determined that plaintiff was a private figure. Accordingly, to find defendant liable, plaintiff had to prove negligence. To obtain punitive damages, plaintiff had to prove defendant acted with malice.

Because there was ample evidence in the record to support a finding of malice, the Court refuses to strike the award of punitive damages. The required malice can be

found in the testimony of one witness, Catherine Cooper ("Cooper")[1].

Catherine Cooper is the editor of Pesticide and Toxic Chemical News, a subsidiary of defendant. (Transcript of June 10, 1988 at 5 [also referred to as "Cooper"]. It was the Pesticide and Toxic Chemical News that published the March 26, 1981 letter of reprimand from Dr. Hanna to Dr. Reuber.

At trial, Ms. Cooper was asked: "Did you make a conscious decision not to inquire into the truth or falsity of those allegations?" She answered: "No, I did not." See Cooper at 30. The following colloquy ensued:

Q I want to make sure we're communicating. You did not make a conscious decision to fail to inquire?

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[1]The required negligence, Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 577 (8th Cir. 1987), is established on page 30 of "Cooper" when she was asked: "Did you make any effort whatsoever, in any way, to inquire into the truth or falsity of these allegations before you printed the letter? Answer: "No, I did not." See Cooper at 30. Negligence was also proven through plaintiff 's expert, Joseph Volz (Transcript of June 7, 1988 at 10-13), as well as through one of defendant's two media experts, John S. Bainbridge, Jr. (Transcript of June 13, 1988 at 23-24). Neither of defendant's experts were helpful. Bainbridge was oblivious to reality and Doelp could not survive voir dire without getting impeached several times. See also Doelp's testimony at 37. See Transcript of June 14, 1988 at 8-12:

Q So we are very clear, your testimony is even if a reasonably prudent reporter had serious doubts about the truth of the charges contained in the letter, that reporter could properly go ahead and write the kind of article Cathy Cooper did?

A Yes.

MS. CHAPPELL-WHITE: Counsel, could you identify what you're showing the witness?

Q Were you deposed in my office June 14, 1982?
A I don't remember where it was but, yes.

Q Would you look at page 589 of your deposition starting at page -- at line 1. Let me ask you if you were asked these questions and gave these answers?

"Q Did you make any effort to determine whether any of the statements contained in that letter were in any way false or unfounded?
"A No.

"Q You decided in other words not to check into the truth or falsity of the statements contained in that letter?
"A At that time.

"Q Did you at some previous time decide to check into the falsity of the letters?
"A No. I was anticipating your next question, sorry.

"Q Did you on some subsequent occasion?
"A No."

Did you give those answers to those questions at that time?
A Yes.

Q I'm going to read carefully the next question. You were asked this question and gave this answer:

"Q So I'm clear, before you published the letter you made a conscious decision not to inquire into whether the statements contained in it were true or false?

"A That's right."

Were you asked that question and did you give that answer?

A That's right.

Q Does that refresh your recollection as to whether or not you made a conscious decision not to inquire into the truth or falsity of the allegations?

A This is what I testified to and that is what I said then and that's what I recall then, and what I just recalled now was what I recall now.

Q Do you have any doubt that your memory of what you did was better back in the summer of 1982 than it is now?

A I don't have an opinion on that.

Id. at 30-32.

For the jury to find malice, they would have to believe the testimony given by Cooper at her June 14, 1982 deposition taken at Mr. Battocchi's office. For the jury to not find malice through Cooper, they would have to believe her trial testimony which occurred five years and 360 days after she gave her deposition testimony. The jury, the Court believes, was entitled to find her earlier recollection surrounding the events of publication more credible than her later recollection adduced at trial.

Accordingly, in light of the principles governing motions for judgment notwithstanding the verdict, defendant's argument is meritless. The standard the Court employs in analyzing a motion for judgment notwithstanding the verdict is whether there is "evidence upon which the jury could reasonably return a verdict for him." Cobb v. Nizami, 851 F.2d 730, 733 (4th Cir. 1988) (citing Mays v. Pioneer Lumber Corp., 502 F.2d 106 (4th Cir. 1974) (emphasis in original); Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160 (4th Cir. 1988) (quoting Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980); cf. Foster v. Tandy Corp., 828 F.2d 1052 (this case identified the standard as "but one reasonable conclusion as to the verdict adverse to the non-movant"); see generally, 9 Wright and Miller, Federal Practice and Procedure § 2537 at 599 n.38 and § 2524 text at n.31 (1971).

The Court is bound by other rules. One is that it may not judge the credibility of witnesses, 9 Wright and Miller, Federal Practice and Procedure § 2524 at 543-44 (1971), and another is that the Court must view the evidence adduced at trial in a light most favorable to the party winning the verdict, or stated otherwise, the non-moving party. Edens v. Goodyear Tire & Rubber Co., 858 F.2d 198, 199 (4th Cir. 1988); Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160 (4th Cir. 1988).

The Court has already mentioned the most probative testimony by Cooper to establish malice, but there is also other evidence. Despite Cooper's admission that the March 26, 1981 letter was, in her words, "the strongest letter of reprimand I think I have ever seen," see Cooper testimony of June 10, 1988 at 23, she "never made an assessment" of whether the letter "would have a tremendous impact on Dr. Reuber's professional reputation" or "what would happen to

Dr. Reuber or his life, his work life or his professional reputation if that letter were put into print." Id. at 20. Finally, she "never made an assessment" on whether she understood "that if a letter like that got printed in the newspaper it could well destroy Dr. Reuber's professional reputation and his professional life." Id. The jury could reasonably find malice based on additional evidence. The Court points to the following exchange:

> Q ... When you published this letter did you care at all whether the charges in it were true or false?
>
> A I don't think I made that assessment.
>
> Q Would it be fair to say that when you published this letter you cared so little about whether it was true or false that you would have published this letter even if you were persuaded some of the statements in it were false?
>
> A Even if some of the statements in it were false it would still have been news.

Id. at 33.

Counsel for plaintiff then referred Ms. Cooper to her deposition of June 14, 1982 and this colloquy ensued:

> Q Let me ask you if you were asked this question and gave this answer:
>
> "Q If you had been persuaded that several of the statements contained in the March 26 letter were false would you nevertheless have published it?

"A Yes, I could have."

* * *

Were you asked that question and did you give that answer?

A Yes, I did.

Q Did you tell the truth when you gave that answer?

A Yes.

Q Were you also asked these questions:

"Q Why would you?

"A Because it was from the man he worked for. It had weight.

"Q Would that be true even if every statement in the letter were false and you were so persuaded?

"A Probably."

Were you asked those questions and did you give those answers?

A I did.

Q Did you tell the truth when you gave them?

A I did.

Id. at 35-36.

Finally, the Court points to this exchange:

> Q So you don't recall whether or not you had doubts about the truth of the charges?
>
> A I know that I did not have doubts about the truth. As a matter of fact, to this day I believe these charges are true because no one, Dr. Reuber or Dr. Hanna[,] has come to me and told me that they are not. (emphasis supplied)

This last excerpted statement of Ms. Cooper's testimony is an interesting one. Under her formula, printing false charges about someone is perfectly acceptable. Ms. Cooper's philosophy can be interpolated as printing first and asking questions later. She operates under the assumption that everything she receives in the office of the News is true, that all is printable and then, after publication, await a phone call about the subject of a given article, then determine if what was already printed was accurate. If she does not get a phone call complaining of the accuracy of a given article or demanding a retraction, then this merely reaffirms her conviction that what was printed was true, even if she never checks the article out for its truth or falsity. Her view undermines the First Amendment. It also constitutes a most extreme departure from responsible journalists.

The Court rejects defendant's argument on the sufficiency of the evidence for another reason: it was never preserved. As the Fourth Circuit has said, "It is generally true that defendants' failure to raise an issue in a motion for directed verdict will preclude its assertion in a motion for judgment notwithstanding the verdict." Federal Savings and Loan Ins. Corp. v. Reeves, 816 F.2d 130, 137 (4th Cir.

1987) (citations omitted). Recently, the First Circuit has also addressed the issue:

> Motions for directed verdict must be made at the close of all evidence; moving at the close of one's opponent's evidence generally will not suffice. See, e.g., R & R Associates, Inc. v. Visual Scene, Inc., 726 F.2d 36, 38 (1st Cir. 1984). The motion must also be made with sufficient specificity to allow the district judge to understand precisely why the evidence is insufficient. Appellate review may be obtained only on the specific ground stated in the motion for directed verdict. Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1, 3 (1st Cir. 1977). A motion under Rule 50(b) for judgment notwithstanding the verdict cannot be made unless the motion for directed verdict was properly brought before the court. Javelin Investment v. Municipality of Ponce, 645 F.2d 92, 94 (1st Cir. 1981).

Wells Real Estate v. Greater Lowell Board of Realtors, 850 F.2d 803, 810 (1st Cir. 1988). Leading commentators agree:

> A motion for judgment notwithstanding the verdict cannot be made unless a motion for directed verdict was made. by the party at the close of all the evidence ... Since it [a JNOV] is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict.

9 Wright and Miller, Federal Practice and Procedure § 2537, at 596, 598 (1971).

In this case, defendant moved for a directed verdict at the close of plaintiff's case on Monday, June 13, 1988 at

11:10 a.m. Defendant focused primarily on the following three items: (1) that plaintiff was a public figure; (2) that there was no evidence of malice; and (3) that because plaintiff resigned voluntarily, he could assign no damages to the republication by The News of the Hanna reprimand letter. The Court denied the motion.

Defendant moved for a directed verdict again at the close of all evidence on Monday, June 20, 1988. Below is the excerpt containing the initial argument of defense counsel:

> MR. HANDLEMAN: Your Honor, at this time we would renew defendant's motion for directed verdict for the reasons that I stated at the conclusion of plaintiff's case and I will take the Court's indulgence to briefly address the issue of public figure ....

(Transcript of June 20, 1988 at 16). Defense counsel then proceeded to argue the public figure issue for nine pages of transcript. Id. at 17-25. He raised no other basis for a directed verdict. As the excerpt makes clear, counsel failed to even mention malice. "Sufficient specificity" is even more conspicuously absent. Accordingly, the issue of malice and the concomitant sufficiency of evidence of it is not preserved.

Before moving on, the Court acknowledges that exceptions exist to the rule that a motion for a directed verdict must be made at the close of all evidence. According to the First Circuit:

> Under very rare circumstances, such a motion need not be repeated at the close of all evidence if such a repetition is clearly superfluous or futile. See

> Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970); Bayamon Thom McAn, Inv. v. Miranda, 409 F.2d 968 (1st Cir. 1969) However, such a case will be unusual, existing only when the additional evidence is so insubstantial as to make no possible difference as to sufficiency, and when, as in Bayamon Thom McAn, the lag between the close of plaintiff's evidence and the end of trial is negligible.

Wells Real Estate v. Greater Lowell Board of Realtors, 850 F .2d 803, 810 n. 7 (1st Cir: 1988) (citations omitted). Wright and Miller are in accord with the First Circuit. These commentators state:

> "[T]he failure to renew it [motion for directed verdict] at the close of all the evidence, though ordinarily fatal to a motion for judgment, need not be so when the only evidence introduced by the defendant was brief and could not conceivably have changed the court's decision on the [initial] motion for directed verdict."

9 Wright and Miller, Federal Practice and Procedure § 2537 at 598 (1971). The exceptions identified by the First Circuit and Wright and Miller do not apply here. A full week passed between the two motions for directed verdict which is not, in this Court's view, a negligible period of time. Further, the evidence put on by defendant during that week was not insubstantial.

The Court notes that the Fourth Circuit has identified other exceptions. Federal Savings and Loan Ins. Corp v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987). In Reeves, the Court relied upon a case called Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986). The Benson case identified two rationales for the rule that a JNOV motion must be

preceded by a directed verdict motion at the close of the evidence. They are (1) the Seventh Amendment right to a jury trial, and (2) allowing the nonmovant -- here, the plaintiff -- to fix his case. Waiving the requirement in this instance would undermine both rationales, and the Court declines to do so.

The Court declines to do so for another reason. Without hesitation, the Court can state that the trial strategy pursued by defendant had, as one of its goals, to secure a verdict in its favor. But it was not the only goal. One could conclude that much of defendant's actions were calculated to create reversible error. When doing so, the defendant must take the bitter with the sweet. In that regard, especially when so apparent in this case, the Court believes it is the obligation of defense counsel to specifically delineate the reasons why it is entitled to a directed verdict. That counsel utterly failed to do so means that, with the exception of the public/private figure issue, he has not preserved it in the context of a JNOV.

The ruling set out by the Court above is made in the context of Fed. R. Civ. P. 50(b). However, because the motion is couched on alternative grounds, the Court must address defendant's motion for a new trial made pursuant to Fed. R. Civ. P. 59. Commentators emphasize the divergent standards to be applied under the two different motions. 9 Wright and Miller, Federal Practice and Procedure § 2539 at 608 (1971) ("[V]ery different standards apply to the branch of the motion seeking judgment notwithstanding the verdict and the branch asking for a new trial on the grounds that the verdict is against the weight of the evidence.").

Under Rule 59, the Court has wide discretion, id. at §

2531 at 575, which is in sharp contrast to a Rule 50 (b) motion where the Court "has no discretion whatever." Id. Perhaps more significantly, contrary to a Rule 50(b) motion, the Court may weigh evidence and take into account witness credibility in the context of a Rule 59 motion. Id.

In this case, there is even another distinction between the Rule 59 and Rule 50(a) motion. As the Court held above, defendant waived its right to have this Court review anything in its JNOV motion except the public/private figure issue. This result was required under Rule 50(a) even though the Court did not make "rigid application" of it. Federal Savings & Loan Ins. Corp. v. Reeves, 816 F.2d 130, 138 (4th Cir. 1987). As Wright and Miller explains, however, the Court must review the sufficiency of the malice evidence under Rule 59:

> The availability of the motion for a new trial is beneficial also to the party who has lost a verdict and who would be entitled to judgment notwithstanding the verdict save for some procedural blunder. The evidence may be wholly insufficient to support the verdict but the court cannot order judgment notwithstanding the verdict if the party neglected to move for a directed verdict at the close of all the evidence, or if he did not properly renew the motion by asking for judgment in the proper time. In those circumstances the court on proper motion, can order a new trial. (emphasis supplied).

9 Wright & Miller, Federal Practice and Procedure § 2539 at 608 (1971).

In rejecting defendant's argument under Rule 50, the Court previously commented on the evidence of malice

adduced at trial. Buttressed by the ability to weigh evidence and assess witness credibility, the Court must deny the Rule 59 motion because evidence of malice went well beyond the clear and convincing standard; it was overwhelming . The Court acknowledges defendant's right to view the evidence anyway it wishes. Here, defendant continues to cling to the belief that there was no evidence of malice. In this Court's view, that position constitutes a unilateral blink at reality.

To prove malice, plaintiff must establish that the defendant published the letter with knowledge that it was false or with reckless disregard of whether it was false or not. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Wolston v. Reader's Digest, 443 U.S. 157, 160 (1979); Fitzgerald v. Penthouse, 691 F.2d 666, 670 (4th Cir. 1982). With respect to the reckless disregard prong, the Supreme Court has said that, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of this publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Fitzgerald, 691 F .2d at 670; Rizzuto v. Nexxus, 641 F .Supp. 473, 479 (S.D.N.Y. 1986). However, a negligent failure to investigate does not establish recklessness. St. Amant, 390 U.S. at 733; Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 478 (8th Cir. 1987). Instead, there must be a high degree of subjective awareness of probable falsity. St. Anant, 390 U.S. at 731; Brueggemeyer v. ABC, 684 F.Supp. 452, 454 (N.D. Tex. 1988); Brueggemeyer v. Krut, 684 F.Supp. 471, 473 (N.D. Tex. 1988). Malice has also been defined as "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co.v. Butts, 388 U.S. 130, 155 (1967). Ms. Cooper's state of mind can be established through

circumstantial evidence. Newton v. NBC, 677 F.Supp. 1066, 1067 (D. Nev. 1987).

Jack Wise gave the letter to Ms. Cooper. See Cooper Transcript of June 10, 1988 at 16. He worked for a chemical company and met with Ms. Cooper with the understanding that she would protect his identity. Id. at 18-19. Yet, Ms. Cooper never examined whether or not Wise or his employer, Stauffer Chemical Co., "had a strong incentive to diminish the impact of Dr. Reuber 's scientific work." Id. at 26. Ms. Cooper testified that, even if she knew some of the statements were false, she would have still ran the story. Id. at 33-35.

On direct examination of Ms. Cooper, plaintiff's counsel asked her to harmonize Dr. Hanna's statement that Dr. Reuber mishandled or made unrestrained interpretations of data, id. at 37, with Hanna's statement that "you may be correct in your interpretations." Id. at 38. Specifically, counsel asked, "Therefore, you would have had to know that one of the two charges Dr. Hanna made had to be false, didn't you?" She replied, "I'm not in a position to judge that." On this testimony, as with testimony excerpted, supra, Fitzgerald is instructive. In that case, the Fourth Circuit said:

> Recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.... [A] publisher cannot feign ignorance ... when there are clear indications present which bring into question the truth or falsity of defamatory statements. (emphasis supplied).

691 F.2d 666, 670 (4th Cir. 1982). On the witness stand, Ms. Cooper either declined to pass judgment on critical

questions put to her by plaintiff's counsel or simply said, "I never made that assessment." Her conduct brings her squarely within the confines of the Fitzgerald statement.

More importantly, Ms. Cooper's credibility is very much at issue. She unequivocally declared at one point that, "I never had a doubt that the allegations were anything but true." Id. at 21. This is a curious declaration in light of her other testimony. Once she got the letter in clandestine fashion, she never called Dr. Reuber about the letter, id. at 23, never called Hanna, id., never contacted anyone at the facility where both worked, id. at 24, never reviewed any documents or contacted "other sources of information to check out the statements made in the letter," id., and, finally, never did "anything whatsoever to check out the truth or falsity of the statements in the letter," id. at 24-25. This begs the question of how, then, did she have no doubts about the truthfulness of the allegations of the letter when she did absolutely nothing to investigate its truthfulness?

As it mentioned earlier, in passing on a Rule 59 motion, the Court can assess witness 's credibility. In this Court's view, Ms. Cooper's credibility left something to be desired.

The Court will next address another defense argument entitled, "The Attempt to Cure the Apparently Inconsistent Verdict by Reinstructing the Jury on Defamation was Fatally Defective, Highly Prejudicial and Incorrect as a Matter of Law." (Motion for JNOV at 18). The nub of defendant's contention here is that there was an inconsistent verdict. Specifically, on June 22, 1988, the jury reported in open Court that they had reached a verdict. Question one of the verdict form asked:

> "Do you find that the defendant, Food Chemical News, Inc., is liable to the plaintiff, Dr. Reuber, for having negligently published a false letter about him?

The Foreman answered, "No." (Transcript of June 22, 1988 at 5). However, with respect to question three,

> "Do you find that the News acted with actual malice as the Court has defined that term for you?"

The Foreman answered "Yes," and the jury awarded $250,000 in punitive damages. Id. at 7. The verdict appeared inconsistent because the jury found malice but not negligence, and, in terms of the quantum of proof, the latter is far easier to prove than the former.

A jury's findings must be consistent with each other. 5A Moore's Federal Practice 49.03 [4], at 49-28 to 49-29 (2 ed. 1988). Where a jury 's findings appear to conflict, "the Court has a duty to harmonize the answers, if it is possible to do so under a fair reading of them." Ladnier v. Murray, 769 F.2d 195, 198 (4th Cir. 1985). Recently, the Second Circuit has said:

> If the inconsistency between special verdict answers is noticed prior to the dismissal of the jury, the trial court has the discretion to resubmit the issues to the jury with a request for clarification, see Guidry v. Kem Manufacturing Co., 604 F.2d 320 (5th Cir. 1979) , whether or not the parties themselves request clarification.

Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 891 (2d Cir. 1988)

Pursuant to its discretion, this is precisely what the Court did. It requested that the jury return the next day, and it asked the following two questions, officially known as questions six and seven:

> Do you find the March 26, 1981 reprimand letter of Dr. Hanna to Dr. Reuber contains statements about Dr. Reuber which were false or not substantially true?
>
> and
>
> Do you find that the News published an article which repeated or summarized portions of a letter about Dr. Reuber which was false and not substantially true?

(Transcript of June 23, 1988 at 6-7). The jury answered "Yes" to both. Id. at 15-16.

The apparent inconsistency between the jury's answer to questions one and three can be harmonized. Again, to frame the inquiry, the issue is "how can the jury find malice and not negligence?" The answer can be easily found. It lies on the Court's inartful drafting of question one. Taking a literal view of question one, there is simply no way the jury could find that the News negligently published a false letter about Dr. Reuber. This is because the News' article was an accurate rendition of Dr. Hanna's letter; that is, everything Dr. Hanna said in his letter was carefully transcribed by the News in its paper. However, this is a republication case and the Fourth Circuit has recently described exactly what that means:

> Under the republication rule, one who repeats a defamatory statement is as liable as the original defamer. Medico, 643 F.2d at 137. The rule is based

> on the legal fiction that the republisher adopts the defamatory statement as his own. Id.

Lee v. Dong-A Ilbo, 849 F.2d 876, 878 (4th Cir. 1988)

Accordingly, question one could have been more precise. It could have asked:

> Do you find that the defendant is liable to plaintiff for having negligently re-published a false letter about him? (emphasis supplied)

Unfortunately, question one was not a model of precision but questions six and seven represent the Court's humble attempt to make up for that imprecision. The Court believes they adequately compensated. Question six asked the jury if Dr. Hanna's letter to Dr. Reuber contained false statements. If they answered "yes," which they did , they were then asked, through question seven, if the defendant published an article which contained some of those false statements. They answered "yes" to that question also. Thus, the jury found that defendant's conduct fit within the rule of law cited in Lee, supra; that is, the defendant repeated a defamatory statement, adopting it as its own, and is, therefore, as liable as Dr. Hanna. However, the jury could not find this, given the form of question one. It simply did not contain whether the News repeated false statements. Instead, it asked if the News negligently published a false letter. But, the News did not publish a false letter in a negligent manner for it contained accurate excerpts of Dr. Hanna's letter. Yet, the News did repeat false statements and, as Lee makes clear, that makes the News liable for defamation.

The Court also believes the theory proposed by

plaintiff is valid. See Plaintiff's Opposition to Defendant's Motion For Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial at 13. The jury could have looked at question one and, in light of the testimony they heard, determined that "negligent" was not the proper adjective to describe the defendant's conduct and checked "no," not realizing that negligence was a predicate for the adjective that they may have believed accurately described the way in which defendant published the article -- which was with malice.

The Court, in the alternative, believes that defendant has waived its right to contest the apparent inconsistencies. Before addressing that point, however, the Court was struck by defendant's position and conduct between the jury's initial verdict on June 22, 1988 and its second and last verdict on June 23, 1988. The Court gives two examples.

First, just after the jury was discharged on June 22, 1988, defendant's first reaction was to ask the Court to simply delete the answer to question three -- finding malice -- and the concomitant damage figure in question five. (Transcript of June 22, 1988 at 13). On June 23, 1988, defendant took the position that the Court should simply submit to the jury its requested interrogatories which were filed with the Court before closing arguments and which, in very large measure, had become irrelevant after the first verdict. Moreover, the number and complexity of defendant's requested interrogatories were rejected by the Court before closing arguments because they were submitted late on June 20, 1988, with the jury being instructed the very next morning, and because they appeared designed for inconsistency which the Court was trying to avoid but which, unfortunately, occurred anyway.

In any event, such rigid adherence by defendants to their written interrogatories was of no benefit to anyone. After the first verdict, everyone associated with the case was faced with a difficult situation with a jury awaiting further instructions. Therefore, simply falling back on something that was already rejected did not qualify as quick thinking which is what the situation demanded.

Second, after the jury answered "yes" to questions six and seven (Transcript of June 23, 1988 at 15-16), defendants were still taking the position that the jury had yet to find defamation. Yet, according to defendants' pretrial brief, (Paper #159 at 7) "defamation consists of the publication of a false and derogatory statement, which causes injury." A persual of questions six and seven, if they do anything, establish defamation as that term is defined by defendant. Accordingly, defendant's argument at that stage of the proceedings can be characterized as absurd and the height of intransigence.

Returning to the waiver issue, courts have held that an objecting party who fails to move for resubmission to the jury, before they are permanently dismissed, waives its grievance. 5A Moore's Federal Practice at 49-45 n. 16 (2d ed. 1988). The transcript reveals that after the jury gave its verdict and was polled by the clerk (Transcript, June 23, 1988 at 29-31), defense counsel never lodged any objection before the Court dismissed the jurors. Id. at 31-35.

The Court next turns to the only matter that defendant, in this Court's view, never waived; that is, the public/private figure issue.

There are two types of public figures. According to the Supreme Court, the first type occupy positions of such

persuasive power and influence that they are deemed public figures for all purposes. Gertz v. Robert Welch, Inc., 418 U.S. 344, 351 (1974). The other type consists of those people who ordinarily are private persons but depart from that status to thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. Id. Those who fall into the second category have earned the appellation now known as limited purpose public figures. Defendant contends that plaintiff was a limited purpose public figure.[2]

Classifying Dr. Reuber as a limited purpose public figure, as defendant suggests, or as a private figure, as this Court held, is a question of law, Rosenblatt v. Baer, 383 U.S. 75, 88 n. 15 (1966); Trotter v. Jack Anderson Enterprises Inc., 818 F .2d 431, 433 (5th Cir. 1987); Fitzgerald v. Penthouse, 691 F.2d 666, 669 (4th Cir. 1982), which is "then carefully scrutinized by an appellate court." Marcone v. Penthouse, 754 F.2d 1072, 1081 n. 4 (3d Cir. 1985).

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[2]The Court is only assuming this is the issue. During the course of the trial, defendant took a scattershot approach in its initial motion for directed verdict. Defendant argued that Dr. Reuber was either a public official or a limited purpose public figure and, at one time, even took the position that plaintiff was an involuntary public figure. However, during its motion for directed verdict at the close of all the evidence, defendant confined its argument to the limited purpose public figure argument. See e.g., Transcript, June 20, 1988 at 16-25. Accordingly, all of defendant's other theories are waived. See, e.g., Transcript of June 16, 1988 at 5 (argument occurring after initial directed verdict motion but before close of evidence on directed verdict with defendant making no concession on public official theory -- this is waived)

Establishing whether a person is a public or private figure defies easy demarcation. Courts have characterized the task as similar "to trying to nail a jellyfish to the wall." E.g., Trotter v. Jack Anderson Enterprises, Inc., 818 F.2d 431, 433 (5th Cir. 1987); Marcone v. Penthouse, 754 F.2d 1072, 1082 (3d Cir. 1985). Nevertheless, courts have developed certain factors to resolve the issue.

The Fifth, Eleventh, and D.C. Circuits use a three-part test. The factors are:

> (1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
>
> (2) The plaintiff must have more than a trivial or tangential role in the controversy; and
>
> (3) The alleged defamation must be germane to the plaintiff's participation in the controversy.

Silvester v. ABC, 839 F .2d 1491, 1494 (11th Cir. 1988); Trotter, 818 F.2d at 433-34; Tavoulareas v. Piro, 817 F.2d 762, 772-73 (D.C. Cir. 1987).

The Second Circuit's test contains four parts as follows:

A defendant must show the plaintiff has:

> (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation;
>
> (2) voluntarily injected himself into a public

controversy related to the subject of litigation;

(3) assured a position of prominence in the public controversy; and

(4) maintained regular and continuing access to the media.

Contemporary Mission, Inc. v. New York Times Co., 842 F.2d 612, 617 (2d Cir. 1988).

The Third Circuit uses a two-part test: (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff's involvement in that controversy. McDowell v. Paiewonsky, 769 F.2d 942, 948 (3d Cir. 1985).

The Fourth Circuit test, which governs this case, consists of five parts:

(1) plaintiff's access to channels of effective communication;

(2) plaintiff voluntarily assumed a role of special prominence in a public controversy;

(3) plaintiff sought to influence the resolution or outcome of the controversy;

(4) the controversy existed prior to the publication of defamatory statements;

(5) plaintiff retained public figure status at the time of the alleged defamation.

Fitzgerald v. Penthouse, 691 F.2d 666, 668 (4th Cir. 1982).

In Gertz, the Supreme Court justified the distinction between public and private figures on the basis that public figures enjoy greater access to channels of effective communication and are therefore more able to counteract false statements published about them than are mere private citizens. 418 U.S. at 344. As an additional basis, the Court stated that public figures assume the risk, because of their involvement in a public controversy, of publishers making false statements about them and, therefore, they deserve less First Amendment protection (i.e., by proving malice by clear and convincing evidence). Id. at 344-45. In contrast, private figures who by definition lack the ability of effective self-help are more vulnerable and thus the state accords them greater protection by reducing their burden of proof and lessening the standards for liability (i.e., negligence by preponderance of evidence). e.g., Contemporary Mission, Inc. v. New York Times, 842 F.2d 612, 619-20 (2d Cir. 1988); Silvester v. ABC, 839 F.2d 1491, 1494 (11th Cir. 1988); Tavoularis v. Piro, 817 F.2d 762, 771-72 (D.C. Cir. 1987).

The Court observes that each test outlined, supra, mentions the word "controversy." That is, limited purpose public figures must thrust themselves into the vortex of a public issue. When ordinary, private citizens do so their status translates into that of a public figure and false statements about them suddenly are subject to a more heightened scrutiny. But the false statements published about these people must be in the context of the controversy that thrust them there. "Misstatements wholly unrelated to the controversy, however, do not receive the New York Times protection." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1298 (D.C. Cir. 1980).

Continuing in this vein, the Court points again to Ms. Cooper's testimony:

> Q: Just to make it very clear, you did not publish this letter in the context of that California malathion controversy, correct?
>
> A: That's correct.

(Transcript of June 10, 1988 at 29)

In this Court 's view, that testimony renders the distinction between public and private figures into a moot question or a purely academic exercise. This is because the statements at issue, for a limited purpose public figure, must be published in the context of the particular controversy. When the publisher does not print the statements in that light, the publisher does not get to enjoy the greater First Amendment protection. In other words, just because a person injects their views into a controversy, that person does not forfeit all facets of his or her life. Instead, that person just forfeits false statements made in the context of the controvery in which he or she is injected. Because Ms. Cooper disavowed any connection between the controversy and the publication, the defendant cannot rely on the controversy to make the plaintiff prove malice. In sum, this Court takes the position that even if Dr. Reuber, by his actions, elevated himself to limited purpose public figure status, he did not have to prove malice to obtain liability. Because the defendant did not publish the article in the context of any controversy that plaintiff could have injected himself into, plaintiff establishes liability by proving negligence and obtains punitive damages by proving malice. The remainder of this opinion will address the public/private figure issue solely for the purpose of a

subsequent tribunal disagreeing with this Court's ruling set out immediately above.

The Court heard argument on the public/private figure issue on more than one occasion. See, e.g., June 16 and 20, 1988. The arguments adduced on June 16, 1988 are instructive. Before addressing them, the Court sets out the events which gave rise to the defamatory letter of March 26, 1981. The Court adds that the relevant time period in divining Dr. Reuber's status starts with the genesis of the controversy and ends with the publication of the letter in the News which occurred on April 15, 1981. Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979).

Sometime in 1980,[3] California began experiencing problems with the med-fly or fruit-fly. The government of California wanted to spray a chemical called malathion to kill the med-fly. Environmental groups and others believed malathion was carcinogenic. In 1979, Dr. Reuber had prepared a manuscript called the Carcinogenicity of Malathion. (Transcript of June 8, 1988 at 22). The John Muir Institute ("JMI"), located in Berkeley, California, is an environmentalist group. Id. at 22. Chris Jenkins, a worker for JMI, id., telephoned Dr. Reuber, requesting a copy of his manuscript on malathion which was unpublished. In the

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[3]According to Dr. Kahn, a defense witness, the med-fly was discovered in California in mid-1980. He was employed in the area of environmental health for the California Department of Health Services. He also worked for the California Department of Food and Agriculture. He testified that the med-fly was found in Santa Clara County in December 1980. He testified further that the controversy began near the end of 1980. Malathion was not sprayed, according to Kahn, until July of 1981.

manuscript, Dr. Reuber reported that malathion caused cancer in rats and mice. Id. at 27.

Santa Clara County opposed the spraying. In fact, the County sought to file an injunction against the State forbidding the spraying. Id. at 31-32. The County's attorney, Charles Perrotta, wrote a letter to Dr. Reuber, who did not respond. Id. at 32. In December of 1980, Perrotta telephone Dr. Reuber, attempting to enlist him in the drive to block the spraying. Dr. Reuber declined to get involved. Id. at 33. However, he did write a letter dated January 16, 1981 to a Mr. Rominger, the director of the California Department of Food and Agriculture. Id. at 33-34. In the letter, Dr. Reuber noted his disagreement with the study of malathion performed by Gulf South Research Institute, a concern used by the National Cancer Institute to study the carcinogenicity of different chemicals. Dr. Reuber wrote the letter on Frederick Cancer Reserch Center ("FCRC") stationery, and forwarded a copy to Chris Jenkins.

Dr. Hanna, Dr. Reuber's boss, learned of the unpublished manuscript sent by Dr. Reuber to the group in California. In short, Dr. Reuber's position, set forth on FCRC documents, was at odds with the government's official position and this provoked Dr. Hanna's March 26, 1981 letter to Dr. Reuber.

The first Fitzgerald factor is Dr. Reuber's access to channels of effective communication. Defendants first contend that testimony at trial revealed Dr. Reuber to be a renowned pathologist, very accomplished and much published in his field. Catherine Cooper also testified that the News, prior to April 15, 1981 had mentioned Dr. Reuber in seven to ten articles. (Transcript of June 16, 1988 at 8).

On this point the Supreme Court has spoken: "Hutchinson's activities and public profile are much like those of countless members of his profession. His published writings reach a relatively small category of professionals concerned with research in human behavior." Hutchinson v. Proxmire, 443 U.S. at 135 (1979). The Court also said:

> [H]is publications in professional journals can [not] be said to have invited that degree of public attention and comment on his receipt of federal grants essential to meet the public figure level. The petitioner in Gertz had published books and articles on legal issues; he had been active in-local community affairs. Nevertheless, the Court concluded that his activities did not make him a public figure.

Id. at 35-36; See also Straw v. Chase Revel, Inc., 813 F.2d 356, 361 (11th Cir. 1987) ("[plaintiff] is well known in some circles, and publishes in a particular field; but not every publisher is automatically a public figure by virtue of his access to a printing press.")

Defendant also points to the number of interviews Dr. Reuber gave. The record reflects that Dr. Reuber gave one interview prior to April of 1981 and that occurred in December 1980, given to a staff reporter of the Peninsula Times Tribune who telephoned Dr. Reuber at his home. (Transcript of June 8, 1988 at 26). The conversation was not tape recorded.[4] The substance of the interview

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[4]Dr. Waddy testified that he may have heard Dr. Reuber's voice on California television in 1981. However, Dr. Reuber never visited California prior to 1982 and thus the only way Dr. Waddy could have heard Dr. Reuber's voice in 1981 was if the reporter from the Tribune

appeared in the December 5, 1980 edition of the paper. Continuing in this vein, Dr. Kahn testified that his department maintained a press clipping service which gathered articles across California on health related matters. In 1985, he tried to identify all articles published before April 15, 1981 which mention Dr. Reuber in the malathion med-fly controversy. Of the literally hundreds of articles on this topic, Dr. Reuber was mentioned in two of them. He had no access to channels of communication.

The second Fitzgerald factor requires the Court to examine whether Dr. Reuber voluntarily assumed a role of special prominence in a public controversy. The Court assumes the med-fly experience in California was a public controversy.

Defendant first points to Dr. Reuber's speech on pecloram in Oregon. (Transcript of June 16, 1988 at 14). The Court ignores it; pecloram is not malathion.

Next, defendant points to Dr. Reuber's sending of his malathon paper to Jenkins of JMI. Id. at 15. Dr. Reuber sent the paper in 1979. No controversy existed until late 1980, according to defense witnesses. With respect to sending the paper, Dr. Hanna testified that his scientists were encouraged to disseminate their views. (Transcript of June 9, 1988 at 14-15).

Finally, defendant points to Dr. Reuber's letter to Rominger. One letter does not satisfy the "special prominence" Fitzgerald demands.

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recorded the December 1980 conversation, then disseminated it.

The third factor looks to whether Dr. Reuber sought to inflience the controversy. Again, the Rominger letter is the cynosure.

On June 20, 1988, the last day of trial testimony, Dr. Reuber was called again to the witness stand. On cross examination, he admitted that Jenkins of the JMI got Dr. Reuber to write Rominger so that the powers-that-be in California paid more attention to the health concern generated by malathion. In the abstract, this testimony is damaging to but one prong of the five part test. The reason, in reality, that the letter is insignificant on this issue is that the letter to Rominger was not widely circulated. Yet defendant seized upon it for the simple reason that it was the only evidence which even remotely supports the theory that Dr. Reuber was a limited purpose public figure.

At bottom, Dr. Reuber mailed his manuscript to JMI before the controversy, gave one interview to a reporter that called him, and sent a letter which was mailed to only two people. Also, of the hundreds of articles appearing on this topic, Dr. Reuber was mentioned in two.

It appears that the D.C. Court of Appeals has addressed the factual issue before the Court:

> Responding to press inquiries or attempting to reply to comments on oneself through the media does not necessarily mean that a person is attempting to play a significant role in resolving a controversy.

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1298 n. 31 (D.C. Cir. 1980). The Court holds Dr. Reuber is a private figure.

Finally, the Court believes the jury's finding of malice devitalizes the public/private figure distinction.

Joseph C. Howard
United States District Judge

Date: December 2, 1988

APPENDIX F

FILED: June 24, 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELVIN D. REUBER :

v. : CIVIL NO. JH-82-910

FOOD CHEMICAL NEWS, INC. :

* * * * *

J U D G M E N T

This action came before the Court for a trial by jury. The issues having been tried and a verdict form having been submitted to the jury with questions one (1) through five (5) on June 22, 1988, and additional questions six (6) through nine (9) having been submitted to the jury on June 23, 1988 and the jury having answered the questions set forth on said verdict form and the additional questions to the jury.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff against the defendant in the amount of Six Hundred Twenty-Five Thousand Dollars ($625,000.00) in compensatory damages, and in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) in punitive damages; for a total judgment of Eight Hundred Seventy-Five Thousand Dollars (875,000.00).

IT IS FURTHER ORDERED AND ADJUDGED that this constitutes a final judgment as to all defendants and also closes out civil action no. JH-85-2028 which was consolidated with the above captioned case.

Dated in Baltimore, Maryland JOSEPH A. HAAS, CLERK this 24th day of June 1988.

By: /s/ V.A. Catlin-Butler
V. A. Catlin-Butler
Deputy Clerk

APPROVED: /s/ Joseph C. Howard
JOSEPH C. HOWARD, USDJ

APPENDIX G

TESTIMONY OF CATHERINE COOPER (JUNE 10, 1988)

[626] MR. BATTOCCHI: Your Honor, plaintiff calls Catherine Cooper as an adverse witness.

CATHERINE COOPER,

called for examination, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE CLERK: Please be seated. Speak loudly and clearly into the microphone in front of you, and please begin your testimony by stating your full name for the record and spelling your last name.

THE WITNESS: My name is Catherine M. Cooper, C-O-O-P-E-R.

THE CLERK: Thank you.

DIRECT EXAMINATION BY MR. BATTOCCHI:

Q By whom are you employed?
A Food Chemical News, Inc.

Q In April of 1981 were you the editor of the Pesticide and Toxic Chemical News?
A Yes.

Q Were all the actions you took that relate to this case [627] undertaken in your capacity as editor?

A Yes.

Q Would you tell the jury about your educational background?
A BA political science and a few hours to master's in international affairs not completed.

Q When did you get out of school?
A Got my BA in 1995.

Q Would you tell the jury what you did for a living until you went to work at the Food Chemical News?
A Each job that I held?

Q Yes.
A After I got out of the school I worked for the Tax Foundation in New York as a researcher. Then I went back to GW to begin work on a master's. I left school, went to the World Bank. I worked as a statistical clerk, then I went to Newsweek in New York, where I was editorial researcher. I came back to Washington and worked for the Air Transport Association. Then I joined a man who had a bureau for a number of trade papers in the medical and agricultural field. Then I worked for Smith, Klein & French Drug Company in their Washington office. Then I worked for Topics publishers at their Washington bureau. They had two trade publications in the drug field. Then I worked for Products Safety Letter, a publication in Washington. Then I joined Food Chemical News.

Q Just to sum it up, you had extensive experience as a [628] researcher and a reporter before you came to the Food Chemical News; is that correct?
A That's correct.

Q We're going to hear about this so let's make it clear; the Food Chemical News is the parent corporation, correct?
A Yes.

Q It publishes the Pesticide and Toxic Chemical News?
A Yes.

A The Food Chemical News?
A Yes.

Q And a couple of other publications?
A That's right.

Q You're the editor of the Toxic Chemical News?
A Pesticide and Toxic Chemical News.

Q When did you first go to work for the Pesticide and Toxic Chemical News?
A In the mid-'70s.

Q Were you there at all times from the mid-'70s until today?
A Yes.

Q You over the course of the years have understood that serving as a reporter is an important function; is that correct?
A Yes, that's true.

Q And serving as a member of the press involves the exercise of rights that we had constitutionally guaranteed in the First [629] Amendment, right?
A That's right.

Q And it's important for the press to be able to publish information that's of interest to the public. That's an important right and you understood that; is that right?
A Yes.

Q And the First Amendment guarantees expressly not only freedom of the press but freedom of speech; you understood that, right?
A Yes, that's right.

Q I'm not trying to disparage at all the importance of those rights, but did you also understand back in the mid-'70s through 1981 that journalists have not only an important duty but also certain responsibilities?
A Yes.

Q For example, our government allows people to get a driver's license, but they have responsibilities not to drive recklessly or go down the wrong way down one-way streets; is that fair?
A That's fair. [630]

Q And we license lawyers and doctors and lawyers and other people and give them the right to practice law or practice medicine, but they also have a responsibility to comply with certain duties that are imposed upon them; is that fair?
A That's fair.

Q And did you understand when you were a reporter that you had not only important rights but important duties as well?
A Yes, I did.

Q And did you understand that one of the duties you had was to pursue legitimate newsworthy information?
A Yes.

Q Did you also understand that one of your duties was to investigate matters that might be of interest to your reading public?
A Yes.

Q Did you also understand that one of your duties was to report stories fairly?
A Yes.

Q Did you also understand that one of your duties was to report news accurately?
A Yes.

Q Did you understand you had a duty to be fair to people that would be covered by your reports?
A Yes.

Q Did you have an understanding that you had a duty not to write stories that might adversely affect the reputation of individuals unless there were good reasons to write those stories?
A The responsibility doesn't extend to censoring the news. My responsibility is to gather and disseminate news and not to [631] make judgments about it.

Q Let me see if we can understand each other. Did you understand you had a responsibility not to publish materials that might damage the reputation of individuals unless there were good reasons to publish those materials?
A It wasn't my responsibility to make the decision, to ask

myself the question whether or not certain news would damage someone.

Q Well, did you have an understanding that you had a duty not to publish allegations about individuals that might be damaging unless you were reasonably satisfied the allegations were true?
A No, not necessarily. If the allegations were false and were made about someone that was newsworthy, that would be a story.

Q And that's the way you felt back in April of 1981?
A Yes, I believe so.

Q Well, did you understand that before you would publish an article that might have a serious impact on somebody's professional reputation and professional life, you had a duty to check out the truth or falsity of the allegations that were going to be printed?
A If I had doubts about the truth or falsity of allegations, yes.

Q What if you didn't have doubts? What if some allegations [632] were made and you really had no way of knowing one way or the other whether they were true or false, you knew nothing about the allegations themselves, in those circumstances did you understand you had a duty to inquire, to find out?
A Yes.

Q Just to make it clear, to find out whether the allegations were true or false?
A Yes.

Q And would it be fair to say you understood back in April of 1981 that the more serious and more potentially damaging the allegations about a particular individual, the more need there would be to inquire into whether they were true or false?
A No. If I had a doubt about them. I didn't have a doubt about those allegations.

Q Let me see if I could pose a hypothetical question. Let's say some source came to you and said somebody has written a letter alleging that the Dow Chemical Company has adopted a deliberate policy of contaminating the nation's water supply and putting poison in baby food; something extreme and absurd like that. Somebody came to you and gave you a letter that said that. Do you understand that, back in '81, that if something like that came to your attention before you would even think about publishing it you would want to check into whether the allegations were true or false?
A Yes. [633]

Q And the same would be true if allegations about an individual who might not be employed by a chemical company but in private practice or an environmentalist or anyone else is concerned, that would still be true?
A Yes.

Q Now, over the course of the years as a journalist have you learned the importance of reputation to individuals?
A I suppose over the course of living I have learned that.

Q And reputation is important to the Pesticide and Toxic Chemical News; is that fair?
A That's fair.

Q And reputation is important to people in all walks of life, whether it's football players or professionals?
A Yes.

Q Reputation is important to them?
A Yes.

Q And you have spent many years through April of '81 covering federal agencies and other aspects of pesticides and toxic chemicals; is that fair?
A That's fair.

Q You covered the EPA and what other agencies?
A In my past?

Q As editor of the Pesticide and Toxic Chemical News.
A Just EPA. A little bit of the Agricultural Department, a little bit of Food and Drug. [634]

Q And you had occasion to come across a lot of scientists that worked in the government in those days, correct?
A Yes.

Q And you had occasion to come in contact with scientists that were in private facilities at universities or elsewhere; is that fair?
A Some.

Q And you had occasion to come in contact with some scientists who worked for private industry under government contracts like Dr. Reuber?
A Some.

Q And did you understand that scientists work hard over the course of their careers to establish good reputations?
A I don't know that I ever asked myself that question and answered it, but it's a reasonable assumption.

Q Did you understand back in the 1981 time frame that one of the means by which scientists display or measure their reputation is through curriculum vitae, how many publications they have offered and how well they have been received?
A I suppose so.

Q Now, you first heard the name Melvin Reuber sometime back in the mid-'70s; is that correct?
A That's fair.

Q Tell the jury how first heard about him.
A I believe it was first in connection with the cancellation of [634] aldrin and dieldrin.

Q And you knew that Dr. Reuber was involved in that proceeding brought by the EPA against the chemical involved?
A That's what I recall.

Q Did you also know that he was involved in the aldrin -- I'm sorry, the heptachlor chlordane, and maybe the Mirex proceeding, maybe the lindane proceedings?
A I knew about the heptachlor chlordane. I'm not certain about the lindane.

Q How about Mirex? Did you hear anything involving Mirex?
A I believe so.

Q And did you learn before April 1981 that Dr. Reuber was an important pathologist upon which the EPA relied in those proceedings?
A Yes.

Q Did you know that he was probably the most important single pathologist upon which the EPA relied?
A I can't be sure of that, no.

Q Now, after you first learned about Reuber's involvement in those EPA proceedings, before 1981 did you also have occasion to learn about other things he did professionally?
A Some.

Q You wrote a total of 10 or 12 different articles that mentioned his name; is that fair?
A Yes, that's fair. [636]

Q And you and Dr. Reuber actually met each other at one conference or seminar somewhere?
A Advisory committee meeting.

Q And there would come times when you would be interested in finding out what Dr. Reuber had written on a subject, you would call him up and ask for a copy of manuscripts?
A I did.

Q And he routinely sent them to you?
A He did.

Q And that was common among other scientists as well?
A That's right.

Q Both published and unpublished manuscripts, right?
A That's right.

Q So by April of 1981 you knew that Dr. Reuber was a scientist who had made a significant contribution in his field; is that fair?
A That's fair.

Q And as of that time you knew that Dr. Reuber had a good reputation for competency as a pathologist; is that fair?
A I'm not in a position to judge his competency as a pathologist.

Q Did you understand he had a good professional reputation?
A In that he was used by the government to help the government take regulatory action, yes. But I don't have personal knowledge of -- [637]

Q Well, you also knew Dr. Reuber had certain views about either how you diagnose tumors or how you classify them but certain views about that subject?
A That's right.

Q And that put him within a group of pathologists that you had heard about?
A That's right.

Q Now, in the course of your responsibilities as a reporter have you become aware of the concept of privacy?
A I don't understand what you're asking.

Q Well, you have worked with several government agencies since the mid-'70s, the EPA and others? Correct, you cover them?
A Yes.

Q And you know that there is a privacy act, for example, that protects the personnel files of government employees, correct?
A Yes.

Q And you know routinely that private firms also protect the privacy of information involving their employees, correct?
A It's an assumption. I don't know it.

Q But you have come to understand that there are some things about people that are inherently private which should not be made public; is that fair?
A That's fair. [638]

Q One of those things is the contents of personnel files; is that fair?
A I don't know whether all -- the entire contents of a personnel file of a public employee should be entirely protected from disclosure. I'm not sure of it.

Q That's fair enough. There is some information in the file of a government employee that involves salary or other things that are public. You understood that?
A Yes.

Q But there is also a lot of information in personnel files that is not public, that is private, and you understood that?
A Yes.

Q And you understood that some matters about people deserve to be kept private whether they are true or they're false; is that fair?
A I never made, asked myself that question and have come up with that answer.

Q Well, have you ever asked yourself about people in general, whether there are some aspects of people's lives that are inherently private and shouldn't be in the newspapers?
A No. I have never asked myself that question.

Q Have you ever thought to yourself, for example, that tax returns of individuals, no question they are true, nobody is making any suggestion they are false, but tax returns about individuals shouldn't wind up being printed in the newspaper? [639]
A I think certain tax returns of certain people probably should be disclosed. Elected officials' tax returns is probably something that should be disclosed.

Q How about something really private, involving a husband or wife or parent and child? Did you think back in '81 that there were some things that were private that shouldn't be disclosed because they are private?
A Yes, I think that.

Q And did you think that that applied to harsh letters of reprimand of personnel?
A No.

Q Now, as of April 13, you had never spoken with Michael Hanna, had you?
A I don't believe so, no.

Q Did you know even who he was?
A Yes, I did.

Q On April 13 or April 14 Mr. Jack Wise called you on the telephone; is that fair?
A That's correct.

Q And Jack Wise was an employee of the Stauffer Chemical Company?
A That's correct.

Q And Jack Wise -- did you know at that time that Stauffer manufactured large numbers of chemicals?
A Yes. [640]

Q Including captan?
A Yes.

Q And Jack Wise called you and said I have got a letter involving Melvin Reuber, and I want to read you parts of it? Is that fair?
A Well, something like that. I can't recall the specificity of what he said on the phone.

Q But he asked you if you were interested and you said yes?
A Yes.

Q Then he said to you I will come over and see you but you have to promise to protect me and give me confidentiality?
A That's right.

Q Jack Wise then came to see you and brought you the March 26 letter, right?
A That's right.

Q When he brought you the letter he again asked you to protect him and keep him confidential?
A Yes.

Q You understood that it was important for you as a reporter to protect your source, correct?
A That's correct.

Q So you promised him you would keep his name confidential?
A Yes.

Q Then he gave you the March 26th Dear Mel reprimand letter?
A That's right. [641]

Q Your conversation with Wise was very short; is that right?
A That's right.

Q You did not discuss the text or substance of the letter with him, did you?
A I don't recall we did.

Q You don't recall any discussions of substance with Wise, do you, other than --
A No, I don't.

Q He just generally gave you the letter, said don't tell anybody who I am, and here is the letter?
A Well, that is about the way I recall it.

Q Getting back to the concept of privacy, do you understand that there may well be a legitimate reason why reporters don't disclose their sources?
A Yes.

Q It's not because they want to cover up lies or anything like that; the identify of the source is a true fact but it's important to protect that sometimes in order to serve a higher purpose; is that fair?
A It's fair.

Q Do you also think the same concept applies to the disclosure of reprimand letters, harsh reprimand letters and the personnel files of the employees of government contractors?
A Do I feel that what?

Q That the employees of government contractors also have the [642] right to keep some information confidential?
A Yes.

Q Including letters in personnel files?
A That really isn't something I have thought a great deal about, but you're asking me if I believe that government contractors have the right to keep their employees' letters of reprimand private?

Q Let me make it more specific. You were dealing with Wise and you promised Wise I'm not going to disclose your name, right?
A That's right.

Q This lawsuit has been going on since August of 1981, correct?
A Yes.

Q You have always refused yourself to tell us who the source was until we found out from somebody else, correct?
A That's correct.

Q You never mentioned who the source was until we confirmed that completely independently, correct?
A That's correct.

Q You felt strongly about that, that the identity of a source is an important matter to you which should be kept private, correct?
A Yes.

Q I'm asking you now to look at the other side of the coin. [643] Did you understand back in April of 1981 that an employee like Dr. Reuber had a legitimate right to feel that a confidential scathing letter of reprimand that belongs in his personnel file should not be made public?
A Yes, I do. I did not quite understand your question the first time.

Q When you got the letter you read it carefully; is that correct?
A Yes.

Q You realized by reading that letter that if it was disclosed it would have a tremendous impact on Dr. Reuber's professional reputation; is that fair?
A I never made that assessment, Mr. Battocchi.

Q Did you think about what would happen to Dr. Reuber or his life, his work life or his professional reputation if that letter were put into print?
A No, I did not.

Q Did you understand that if a letter like that got printed in the newspaper it could well destroy Dr. Reuber's professional reputation and his professional life?
A I never made that assessment.

Q Did you understand that even if that letter was true from beginning to end it was a private document that should not wind up being printed in the newspaper?
A No, I didn't understand that. If I had it, it was not [644] private. The way I got it indicated that it wasn't very private.

Q All right. I understand what you're saying, but I want to make something clear you never got a letter from anybody besides Wise; is that correct?
A That's correct.

Q As of the time Wise gave it to you you had no idea that --there were no ccs on your copy were there?
A I don't recall, Mr. Battocchi.

Q The only people you knew that had that letter when you got it were Hanna, Reuber and Wise, correct?
A That I knew?

Q Yeah.
A That had it?

Q Yes.
A That's correct.

Q You had no knowledge that anybody else had it at that time?
A No knowledge.

Q When you got it and you knew about the significance of Dr Reuber's professional work over the years, did you say to yourself if I publish something like this even if it's true this is going to destroy this man?
A I never made that assessment.

Q Did you think in the slightest to yourself if I take this [645] letter and it's false and I publish it, it's going to wrongfully destroy this man?
A I never had a doubt that the allegations were anything but true.

Q Just so we're very clear on what we're talking about, you understand the difference between saying Hanna made all the allegations that are contained in the letter and saying the allegations Hanna made are true?
A Of course.

Q Are you telling me that you never had any doubt after you got the letter that the letter was authentic, it was a true and accurate copy of all of the letter that Hanna had written to Reuber?
A That's what I believe.

Q Did you ever check that out with Wise or anybody else?
A What do you mean?

Q Wise comes up to, he does not give you the original letter, he gives you a Xerox; is that correct?
A Yes.

Q It's a typewritten letter. It has Hanna's signature on it and no ccs on it?
A I don't know whether it had ccs or not.

Q All right. That is not really my focus, but you now have a Xerox copy of the letter. It has Frederick Cancer Research Center stationery and a lot typed in between the top of the [646] letterhead and the bottom?
A Yes.

Q Did you ask Wise look, I don't know whether this letter is a forgery or not?
A No, I did not ask him that.

Q Did you make any inquiries whatsoever to find out if the letter was a forgery or not?
A No, I didn't.

Q Did you have any independent knowledge upon which to determine whether the letter was a forgery?
A I determined from the letterhead and from the contents of the letter and just from its general presentation that it was an authentic letter.

Q You got the letter, it was either on Monday or Tuesday?
A That's correct.

Q You normally go to press on Wednesday, correct?
A Yes.

Q After you got this letter and read it, did you understand that this was a devastating attack upon Dr. Reuber?
A Yes, it's the strongest letter of reprimand I think I have ever seen.

Q You understood that after you initially read the letter carefully?
A Yes.

Q After you initially got the letter, did you call Dr. [647] Reuber and ask him?
A No, I did not.

Q Did you ask him anything?
A No, I did not.

Q After you got the letter did you call Dr. Hanna and talk to him about it?
A A few days after, yes, I did.

Q That was after it was published?
A That's right.

Q If I'm not making this clear I would like to; I'm talking about what you did between the time you first got the letter and the time it hit the streets, it was mailed out to your subscribers. Am I being clear?
A Yes.

Q After you got the letter and before it was presented, did you pick up the phone and call Dr. Hanna to ask him whether the letter was authentic?
A No, I did not.

Q Did you pick up the phone to ask him whether the charges were true?
A No.

Q Did you pick up the phone and call him about anything?
A At that time, no.

Q Did you contact any other scientist out at Frederick that may have been knowledgeable about the subject matter of the [648] letter to talk to them about it?
A No, I did not.

Q Did you review any documents or contact other sources of information to check out the statements made in the letter?
A No, I did not.

Q Did you know Willie Lijinsky back in those days?
A No.

Q After you got the letter and before you published it, did you do anything whatsoever to check out the truth or falsity of the statements in the letter?
A No.

Q I would like now to ask you some specific questions about the letter and the article if I could. I show you a copy of the letter.

MS. CHAPPELL-WHITE: What exhibit are you showing?

MR. BATTOCCHI: It's not an exhibit. I will use 46. May I have Plaintiff's 46 please?
(Document tendered.)

BY MR. BATTOCCHI:

Q Do you have in front of you, Ms. Cooper, a copy of the March 26 reprimand letter?
A Yes, I do.

Q Would it be fair to say that when you got this letter you understood it was being provided to you by a chemical company source? [649]
A Yes.

Q Did you understand that Stauffer Chemical Company and others had a keen interest in Dr. Reuber's professional work?
A Yes.

Q Did you understand that Stauffer might well have an economic interest in discrediting some of Dr. Reuber's studies and particularly the one captan?
A I did not examine the motives of Mr. Wise. I think you should ask him what his motives were.

Q All right. I understand you did not examine his motives, but you understood Wise was coming to you as a chemical company informant, correct?
A He was an employee of a chemical company.

Q He was coming to you for a very clear purpose?
A He was giving me some news and he had frequently given me news in the past.

Q Let's be a little precise in our terms. At the time Wise was giving you the letter, he did not tell you that it was news, did he?
A No.

Q As far as you know he was the only person besides Reuber and Hanna who had the letter?
A That I knew of. That's correct.

Q You knew that Reuber had written scientific studies calling some of Stauffer's chemicals carcinogens? [650]
A I don't know that I knew that. Perhaps hearsay, understanding that, but I don't think that I knew that.

Q You would have known when Wise came to you that he and his company would have had a strong incentive to diminish the impact of Dr. Reuber's scientific work; is that fair?
A I didn't examine that, Mr. Battocchi.

Q Did you take that fact into account in any way whatsoever before you decided to publish the letter?
A No.

Q Now, you got this letter on April 13th, 1981, correct?
A Or possibly the 14th, I don't recall.

Q I didn't mean to tie it to April 13th. You also said 13th or 14th and I understood that, but when you read the letter you understood that somehow something involving Mr. Rominger, the Director of the Department of Food and Agriculture in Sacramento, California was involved; is that correct?
A Yes, that's correct.

Q It has been a long time since April of 1981, but I would like you to think back to those days. There had just been a change in administration in those days, correct?
A Yes.

Q President Reagan had gotten elected and took office on January 20th, right?
A Yes. [651]

Q He came from California?
A Yes.

Q As did many of the individuals who came to Washington and worked for the government, correct?
A Yes.

Q If I recall correctly, by that time Mr. Watt was going around making statements about killer trees; do you recall?

MS. CHAPPELL-WHITE: Objection. I don't see what this has to do with this case.

THE COURT: I will sustain the objection.

BY MR. BATTOCCHI:

Q Did you understand at that time that there were important possible reasons, political reasons, why people would have a motive to discredit Dr. Reuber?
A No.

Q Did you find out who this Mr. Rominger was before you published the letter?
A No.

Q Did you make any effort to find out if any kind of political controversy was involved in this letter?
A No, I did not.

Q Before you published the letter did you make any effort to find out why Hanna wrote it?
A No, I did not.

Q When you published the letter, you were not aware of any [652] picloram controversy going on out in Wisconsin, were you?
A I can't place the times together, Mr. Battocchi. I don't know -- I knew about picloram, but I don't know when I knew about it.

Q I want to go back to the time that Wise first walked into your office, just to make the questions clear, the second before you got the letter, at that time, do you recall being aware of any controversy out in Wisconsin involving picloram?
A I don't think, but I don't know for sure.

Q At that time do you recall being aware of any controversy out in California involving malathion?
A I'm not sure.

Q You did not publish this letter to influence that controversy out in California, did you?
A No, I did not.

Q Just to make it very clear, you did not publish this letter in the context of that California malathion controversy, correct?
A That's correct.

Q Did you know of Dr. DeVita by reputation as of the time you got this letter?
A I don't know.

Q Do you know of Dr. Adamson by reputation?
A No, I don't.

Q How about Dr. Hartwell? [653]
A No.

Q You do know Mr. Hollis of the National Agricultural Chemical Association?
A Yes, not well. I know him.

Q You knew him back in those days?
A Yes.

Q Have you read this March 26 letter recently?
A Yes.

Q Would you agree with me that many of the statements in this letter would be relatively easy to check out?
A No, I don't agree with that.

Q Let me ask you to focus on the sentence: Dr. Reuber misrepresented his publications as having the endorsement of the NCI and Litton. Is that the kind of thing that could be checked out fairly easily?
A I don't know what the -- what the publications were.

Q When I mean checked out I don't mean you going to the library, I mean calling up Reuber or Hanna.
A I know you didn't mean that.

Q Would you agree that many of the allegations in this letter are things which you could have easily asked Dr. Reuber or Dr. Hanna about?
A Yes.

Q Now, I know you told us about what you did not consider before you published the letter. Did you make any effort [654] whatsoever, in any way, to inquire into the truth or falsity of these allegations before you printed the letter?
A No, I did not.

Q Did you make a conscious decision not to inquire into the truth or falsity of those allegations?
A No, I did not.

Q I want to make sure we're communicating. You did not make a conscious decision to fail to inquire?
A That's right.

MS. CHAPPELL-WHITE: Counsel, could you identify what you're showing the witness?

Q Were you deposed in my office June 14, 1982?
A I don't remember where it was but, yes.

Q Would you look at page 589 of your deposition starting at page -- at line 1. Let me ask you if you were asked these questions and gave these answers?

"Q Did you make any effort to determine whether any of the statements contained in that letter were in any way false or unfounded?
"A No.

"Q You decided in other words not to check into the truth or falsity of the statements contained in that letter?
A At that time.

Q Did you at some previous time decide to check into the truth or falsity of the letters? [655]
A No. I was anticipating your next question, sorry.

Q Did you on some subsequent occasion?
A No."

Did you give those answers to those questions at that time?
A Yes.

Q I'm going to read carefully the next question. You were asked this question and gave this answer:

"Q So I'm clear, before you published the letter you made a conscious decision not to inquire into whether the statements contained in it were true or false?
A That's right."

Were you asked that question and did you give that answer?
A That's right.

Q Does that refresh your recollection as to whether or not you made a conscious decision not to inquire into the truth or falsity of the allegations?
A This is what I testified to and that is what I said then and that's what I recall then, and what I just recalled now was what I recall now.

Q Do you have any doubt that your memory of what you did was better back in the summer of 1982 than it is now?
A I don't have an opinion on that.

Q I want to explore the subject that we lawyers call state [656] of mind. I want to ask some questions about what you were thinking and what you were aware of and what your mental state was when you decided to publish this letter.

When you decided to publish this letter did you care at all about whether the allegations in it were true or false?
A I cared to the point, to the extent that I wanted to be sure that I had an authentic document that contained charges that were made by the man who signed it. I cared that I didn't have a fraudulent document.

Q Let me try to make my question clear. We have in the past drawn a distinction between the authenticity of the charges in this letter and the accuracy.
A Okay.

Q The authenticity means he made these statements, it's not a bogus or spurious letter, correct?
A Yes.

Q The accuracy means these charges by Hanna are true or false. Are we together so far?
A Yes.

Q My question was directed to your state of mind. When you published this letter did you care at all whether the charges in it were true or false?
A I don't think I made that assessment.

Q Would it be fair to say that when you published this letter you cared so little about whether it was true or false [657] that you would have published this letter even if you were persuaded some of the statements in it were false?
A Even if some of the statements in it were false it would still have been news. It would have been news because Dr.

Hanna was making false charges about Dr. Reuber.

Q Let me make sure we are together. I'm not sure I understand the answer. It may have been clear. Did you care so little about the truth or falsity of the charges in the Hanna letter that you would have published this letter even if you were convinced some of the statements in it were false?
A I just answered the question. If, even if I had known that some of the statements were false it would still have been a news story because Dr. Hanna was making false statements about Dr. Reuber.

Q You never anywhere in this article said that Hanna was making false statements about Reuber, did you?
A No.

Q In fact, you tried to copy the letter as completely as you could?
A I did.

Q Would you turn, please, to page 76 of your deposition? This is that same time on June 14, 1982?
A Yes.

Q Let me ask you if you were asked this question and gave this answer: [658]

"Q If you had been persuaded that several of the statements contained in the March 26 letter were false would you nevertheless have published it?
"A Yes, I could have."

THE COURT: Give the page and line.

MR. BATTOCCHI: I'm sorry. Page 76, lines 14 through 20.

A What was your question?

Q First of all, is there a typo? Does that read yes, I would have instead of yes, I could have?
A I don't think that's a typo. It says yes, I could have and I think I meant that.

Q When you testified that you could have published the March 26th letter even if you were persuaded that several of the statements contained in it were false, did you tell the truth?
A Would you repeat that, please?

Q Yes, ma 'am. Let's start again. Were you asked this question and gave this answer?

"Q If you had been persuaded that several of the statements contained in the March 26 letter were false would you nevertheless have published it?
"A Yes, I could have."

Were you asked that question and did you give that answer?
A Yes, I did. [659]

Q Did you tell the truth when you gave that answer?
A Yes.

Q Were you also asked these questions:
"Q Why would you?
"A Because it was from the man he worked for. It had weight.

"Q Would that be true even if every statement in the letter were false and you were so persuaded?
"A Probably."

Were you asked those questions and did you give those answers?
A I did.

Q Did you tell the truth when you gave them?
A I did.

Q In fact, the reason you published this letter is because it contained extremely critical charges about Dr. Reuber; is that right?
A The reason I published this letter was because it was a piece of news that Dr. Hanna had made these charges about Dr. Reuber. Dr. Reuber was a man of some importance to our readers.

Q I want to make sure we are communicating. Did you publish this letter because you thought -- strike that.
Did you think this letter was newsworthy because it was extremely critical of Dr. Reuber's work?
A Yes. [660]

Q And is that why you published it?
A That is one of the reasons.

Q Did you understand when you published this letter for that reason that if this letter were to be published and these extremely critical charges were not true it might have devastating consequences to Dr. Reuber?
A I never made that assessment, Mr. Battocchi.

Q Now, you did read the letter carefully when you got it, correct?
A Yes, I did.

Q And you wrote a headline in the Pesticide and Toxic Chemical News that said Dr. Mel Reuber Censored by Cancer Research Center for Unprofessional Conduct, Misinterpreting Data? Do you see that? I'm sorry. Plaintiff's Exhibit 1 with the first page.
A That's correct. Yes.

Q Now, you understand that to a man who spent his whole professional life in the area of working with scientific data, a charge that he mishandled or misinterpreted data would be a serious one; is that fair?
A I never made that assessment.

Q Well, when you published the charge that Dr. Reuber had mishandled data you were aware of information which would have given you very strong reason to doubt whether that charge was true or false, weren't you? [661]
A I don't understand the question.

Q Let me ask and go about it a different way. Do you have the letter, Exhibit 46, in front of you?
A Yes.

Q Let me get to -- let me start with the matter of mishandling data or making unrestrained interpretations of data. You understood Hanna made that charge, correct?
A Could you tell me where that is?

Q Sure. Hanna makes the charge that Reuber mishandled scientific data and engaged in unrestrained interpretation of those data. Do you see that?

A Yes, I do.

Q And you would have been aware of that merely by reading the first paragraph?
A Yes.

Q Now, let's go over to the second page. You knew of Dr. Reuber's prior work for the government and his professional reputation when you read this letter; you have already testified to that, correct?
A Yes.

Q And you had not known of any information that would have given you reason to believe that Dr. Reuber had ever been guilty of misinterpreting or mishandling data, had you?
A No.

Q Now, look at the second paragraph. I'm sorry. Look at [662] the second page, three lines from the bottom. Hanna says this:
Quote, you may be correct in your interpretations, unquote. Do you see that?
A Yes.

Q Hanna goes on in the next page to say you're a good pathologist and have a lot to offer the carcinogenesis testing program, correct?
A Yes.

Q And you knew even Hanna agreed Reuber's scientific interpretations might be correct?
A From reading this?

Q Sure. You knew that at the time, correct?
A From reading the letter.

Q And you knew that when you published the headline that said Reuber was censored for misinterpreting data?
A Yes.

Q Or mishandling data. Therefore, you knew one of the two statements in Hanna's letters had to be false, didn't you?
A I don't think I came to that conclusion, no.

Q Well, a scientist either is a good pathologist or he is not a good pathologist, at least in the view of a guy writing a letter, correct?
A Hanna seems to have had both opinions.

Q And did you understand when you published this letter that Hanna was contradicting himself about the quality of Reuber's [663] work?
A Well, I read the letter and I saw both sides. Yes.

Q Therefore, you would have had to know that one of the two charges Hanna made had to be false, didn't you?
A I'm not in a position to judge that.

Q I'm asking you now reading the letter. You would have to know reading it now that one of the two charges was false even?
A No. He said he had specific charges about specific instances and what he was saying in toward the end was overall, was generalized.

Q So when Hanna said on the one hand you have engaged in unrestrained interpretations of data and then says on the very next page you may be correct in your interpretations --
A That's some interpretation.

Q That didn't suggest to you serious doubts about whether Hanna's claim of misinterpreting data was false?
A No.

Q Does it right now?
A No.

Q Don't you understand those two charges are fundamentally inconsistent?
A He was talking specifically about certain data and then he was talking generally about his ability as a pathologist. I think they are quite different.

Q So having had a chance to consider this letter carefully [664] you don't see any contradiction or inconsistency between the two parts of Hanna's letters I have been talking about?
A One, he was talking about specifics and the other he was speaking generally.

Q When Hanna said you may be correct in your interpretations, do you think Hanna was talking about something completely different from the interpretations he had just mentioned?
A Well, could I take time to read the letter then?

Q Of course.
(There was a pause in the proceedings.)
A I believe he is talking about, that he isn't talking about the same instance, when he is first talking about checking out the slides and making the reinterpretation on the first page. And then on the second page at the bottom he says you may be correct in your interpretations. It doesn't relate necessarily to the first part of the letter.

Q I didn't ask you whether it related necessarily. Did you understand that they were both relating to the same general subject matter, the subject matter of Reuber's scientific interpretations?
A Malathion and malaoxon. No.

Q And the picloram?
A No, I don't see that that's necessarily the case. It's not clear. [665]

Q So you don't see any, even potential inconsistency right now after having carefully considered this between Hanna saying on the first page of the letter you're guilty of mishandling scientific data and engaging in unrestrained interpretations of those data, and then the statement on the second page that Reuber may be correct in his interpretations?
A I think he is talking in one place about specific interpretations, having to do with malathion. I think in the--on the second page he is speaking generally.

Q When Hanna speaks on the third page about Reuber being a good pathologist, do you see that?
A Yes.

Q Does that raise serious doubts in your mind as to whether some of the earlier charges Hanna had made are true or false?
A No.

Q It didn't then and it doesn't now?
A No.

Q Now, Hanna accuses Reuber in here of using an unreviewed forum instead of the forum accepted by scientists. Do you remember that or shall I point to the specific language?
A Where is it?

Q Look on page 2, six lines from the bottom. Quote, rather than using the forum accepted by scientists you have used an unreviewed forum to gain easy and immediate voice to the media. Do you see that? [666]
A Yes.

Q So far as you know, had Dr. Reuber always published his scientific articles in reputable medical journals?
A I have no idea about that.

Q Well, you know the process that medical journals go through before they publish scientific --
A Yes. Some of them.

Q But they generally follow a fairly consistent practice; is that fair?
A I don't think that all of them purely do.

Q Most them are peer reviewed before they were printed?
A That's something you know. I don't know that.

Q Did you in all of your dealings with EPA and government agencies look into that question or ever become aware that generally articles are peer reviewed before they become published articles?
A I know that some journals generally do.

Q And when you read this sentence in this letter did you understand that there was a fundamental inconsistency that appeared on the surface here? On the one hand Reuber seemed to be a scientist writing articles presumably for medical journals and on the other hand he is being accused of going through an unreviewed forum. Did that raise any doubts in your mind?
A I don't recall looking with specificity that when I was reading the letter or thinking about it at all. [667]

Q So you don't recall whether or not you had doubts about the truth of the charges?
A I know that I did not have doubts about the truth. As a matter of fact, to this day I believe these charges are true because no one, Dr. Reuber or Dr. Hanna has come to me and told me that they are not.

Q Ms. Cooper, this lawsuit was filed in August of 1981; is that right?
A Yes.

Q Mr. Hanna has been deposed in this case over a course of years. Are you aware of that?
A No. I'm not aware of that.

Q You mean your company hasn't told you that?
A Hasn't told me that Dr. Hanna has been deposed. No. They haven't told me that.

Q Has anybody told you that Dr. Hanna over the course of years has given testimony undermining virtually all of the charges in that letter?
A No. No one has told me that.

Q Have you to this day ever published any kind of retraction of any of the charges in this letter?
A No, I have not.

Q Going back to the letter itself.

THE COURT: Let me see counsel before you continue, please.

[668] (Conference between Court and counsel, not recorded.)

THE COURT: Mr. Foreman, ladies and gentlemen you have a choice. You can take your lunch now and come back at 1 o'clock, or if you are willing you can sit until 1:30. Over that period of time we expect to get through with the testimony of Ms. Cooper as well as -- that's direct and cross-examination, so you will be able to go home at 1:30, which is 30 or so minutes from now. What's your pleasure? caucus with your jury, Mr. Foreman, and let me know what the situation is.

(Discussion held off the record.)

THE FOREMAN: They all agree, Your Honor, we will stay.

THE COURT: All right.

MR. BATTOCCHI: Can I have five minutes, Your Honor, to compose my thoughts so I can finish more efficiently?

THE COURT: All right. Stay within the ambit. You say 1:30 and I will hold you to it.

MR. BATTOCCHI: Yes, sir.

(Brief recess.)

MR. BATTOCCHI: Thank you, Your Honor.

BY MR. BATTOCCHI:

Q Ma'am, I would like you to go again to the second page of the letter. I will read these sentences in the letter; these two sentences appear toward the bottom of page 2. Quote: You [669] exploited the privilege of scientific communication in an unrestrained manner. You have pontificated and criticized other scientists in a manner that excited the public in areas of immediate national concern. Rather than using the forum accepted by scientists, you have used an unreviewed forum to gain easy and immediate voice to the media where public health issues are most easily sensationalized.
Do you see that?
A Yes.

Q Hanna then goes right on to say, quote: The scientific community, and the public, has not had the advantage or privilege of learning and evaluating your view since you declined to pass it through the standard review procedure established for this purpose. Unquote. Do you see that?
A Yes.

Q In the first part of that letter I read you, Hanna is saying in substance Reuber, you're talking too much and spreading your views all over public places.

In the second sentence he's saying in substance the public and the scientific community has not had the advantage of your view. Aren't those two parts of the letter fundamentally inconsistent?

A I don't know that he's talking about the same pesticides or same reviews in both instances. It's not clear.

Q He could have been and he could not have been? [670]

A To me that's the way I read it.

Q You made no effort whatsoever to find out?

A I did not.

Q You have testified that when you got the letter you were aware of Reuber's general reputation in some of his past work, is that correct?

A Yes.

Q You were aware he made a significant contribution to several agency proceedings, correct?

A At least two.

Q You had written 10 to 12 articles which at least mention his name and mention some of his scientific work?

A That's correct.

Q You were not aware of Hanna's professional competence at that point, were you?

A No. I only knew what his job was.

Q All you knew was that he ran the facility?

A That's right.

Q You did not know if he was spending his time as a scientist or as a manager, right?
A No, I didn't.

Q You were communicating, but to be technical when you say no, you did not, you mean that's right, you did not know?
A That's right, I did not know.

Q So when you get a letter by Hanna making this kind of a [671] very serious attack upon Reuber, did you ask yourself how could these charges be true?
A No, I did not.

Q You never formed any opinion on whether the charges were true or false; is that right?
A No. My personal -- no, I did not.

Q You never formed a belief as to whether the charges were true or false, correct?
A That's correct.

Q That's because you made a conscious, knowing decision not to inquire into the truth or falsity of those charges?
A That is as I was deposed earlier. My recollection now is slightly different but I don't think it's significantly different.

Q The answer to my question is yes?
A Yes.

Q Did you ever think after you got the letter before you published it to reach for the telephone?
A No, I did not.

Q Were you afraid that if you reached for the telephone you might not be able to run this story the way you did?
A No.

Q What you did was essentially repeat Hanna's letter from beginning to end?
A That's correct. [672]

Q Were you concerned that if you picked up the telephone and called Hanna, Hanna would disavow what was in the letter?
A No.

Q Were you concerned if you called up Reuber and asked Reuber, Reuber would tell you the letter was a lie?
A I never asked that question of myself, Mr. Battocchi.

Q Were you concerned that if you ever started to look into the truth or falsity of these charges you would not be able to run the story the way you did?
A I never asked that question of myself.

Q Your subscribers are primarily pesticide and toxic chemical companies and some government agencies as well?
A Yes, and some environmental groups and some universities.

Q Do you generally think about the interests of the people that butter your bread when you decide what articles to print and what articles not to print?
A I don't think about the interests, if you're meaning interests in terms of -- how do you mean interests?

A You have a reading audience that is composed of chemical companies, government agencies and libraries, and

environmental groups?
A Yes.

Q Anybody that is interested in pesticide and toxic chemical news, but limited to that subject matter?
A Yes. [673]

Q Do you have think to yourself when publishing an article the people who were sending in the money that keeps us running are going to like this or not like it?
A No.

Q Did you ever think about, before you published this letter, what the effect would be on Dr. Reuber's emotions, if the letter was false?
A No, I did not.

Q Let's go back to the example I gave you earlier. If you get a letter from somebody that says Dow Chemical or some other company has a plan to put toxic chemicals in baby food, you got a letter like that, would you put it into print without checking out whether the statements in it were true or false?
A No.

MR. BATTOCCHI: I have no further questions, Your Honor.

THE COURT: Cross-examine, please.

CROSS-EXAMINATION BY MS. CHAPPELL WHITE:

Q All right, Ms. Cooper, in the very beginning of your direct examination Mr. Battocchi asked you a few questions about your general understanding of your duties as a reporter, and one of the questions that he asked you is that if you knew nothing about -- I don't know, subject matters or something like that, would you have a duty to inquire whether allegations were true or false and you answered yes. [674]

Were you answering that question in the context of this litigation or knowledge about this letter or were you answering that as a general hypothetical duty to inquire into news?

A He was asking it as a general question and I answered it as a general question should be answered.

Q All right. He also asked you, a general question I think, about whether you would check out allegations, and you answered yes, you will. When you say check out allegations do you mean you would do a complete independent investigation of the truth or underlying events or you would investigate to see whether this person really made these charges and things like that?

A The second.

Q You also testified that you thought this letter would be newsworthy even if the allegations were false because that would be a story. Could you briefly explain why you thought in this case it would be a story even if the charges against Dr. Reuber were false?

A Because it would have been Dr. Reuber's boss making false charges against Dr. Reuber and Dr. Reuber is a person of some significance in the community in which I report.

Q Several times you were asked questions about your knowledge of Dr. Reuber's reputation. Did you, in 1981, have any personal knowledge of his capabilities as a pathologist?
A Since I am not a pathologist I could not have personal [675] knowledge of his capabilities as a pathologist.

Q So the question -- the answer is no, you did not.
Just for the record, Pesticide and Toxic Chemical News is not sold at supermarket checkout stands, is it?
A No.

Q It's mailed to its subscribers, isn't it?
A Yes.

Q It doesn't normally publish articles about individuals, does it?
A No.

Q Also for the record, does your publication do investigative type reporting like Watergate stories for instance?
A No.

Q Normally Pesticide News publishes straight news reports of EPA and other similar matters related to government regulations of pesticide chemicals; isn't that true?
A That's right.

Q Would you please briefly explain for the jury what it is you do to gather information that is typically carried in your publication?
A Interview public officials, attend hearings, attend

conferences, attend advisory committee meetings, read papers, read testimony.

Q You're also contacted by individuals -- it's not unusual [676] for you to be contacted by individuals either in government or private industry regarding the matters that you publish articles about; is that unusual?
A It's not unusual.

Q Another time I think you testified as to Dr. Reuber's reputation, or should I say your knowledge of his reputation. Is it your testimony that you were aware that Dr. Reuber had a reputation for always finding pesticides to be carcinogenic where others had found then, not to be; is that a fair statement?
A Frequently.

Q Were you aware that whenever Dr. Reuber took part in these government regulatory actions he was already well known -- it was already well known that he would take the position that regardless what chemical it was that it was carcinogenic; were you aware of that?
A The agencies used him because he had a reputation for being conservative about carcinogenicity of pesticides.

Q You also testified, I think, that the circumstances under which you received the letter indicated to you that it was not private. Was that because you received the letter from someone who worked for a chemical company?
A Yes.

Q Was it also your testimony that you don't recall whether or not you knew if anyone else had seen it? [677]
A I didn't know at that time.

Q Is it also your testimony that one of the reasons that this letter was newsworthy is because it contained various serious charges about someone who worked at a federal research facility?
A Yes.

Q Is it also your testimony that based on your knowledge of the persons in the letter, the institutional stationery, your knowledge of the reliability of your source and the matters discussed in the letter, that you, in fact, did not have any doubt whether Dr. Hanna's statements in the letter were true?

MR. BATTOCCHI: It's an enormously leading question.

THE COURT: Rephrase without making it a leading question.

MS. CHAPPELL-WHITE: Thank you, Your Honor.

BY MS. CHAPPELL-WHITE:

Q Would you just state for the record the reasons why you testified that you had no doubt as to the truth of Dr. Hanna's statement -- statements in the letter from your recollection?
A Are we talking again about the authenticity of the letter.

Q Let me try it another way.
I think you testified earlier that you did not have any doubt as to the truth of Dr. Hanna's statements.

MR. BATTOCCHI: Leading again, Your Honor.

MS. CHAPPELL-WHITE: I will drop it. We covered it. [678]

I don't need to go any more. I think her testimony is already fairly clear on the record.

BY MS. CHAPPELL-WHITE:

Q Another matter that came up on your direct examination was whether or not you made a conscious determination not to investigate this matter, and I believe you seem to misunderstood that question. Would you explain what the decision was that you made in publishing this article, your own testimony, what it was you decided to do?

MR. BATTOCCHI: Whether or not the witness misunderstood is for the witness to say.

THE COURT: Overruled. You may answer, Ms. Cooper.

A I decided that the letter itself was a piece of news and I decided that I was going to run it.

Q There was also an inquiry as to your personal knowledge of the California controversy concerning malathion. Do you recall today as you testify what you knew when about the California malathion controversy?

A I'm not sure when I knew about it and I'm not sure I knew about it before I read the letter. I knew about it when I read the letter but I don't know whether I knew about it before or after. I really can't recall.

Q Today as you testify do you have any knowledge at all whether the California malathion controversy was restricted to the Sacramento area? [679]

A I don't know.

Q As you testify today do you have any recollection what you knew about any Wisconsin controversy involving picloram or when you knew it?
A I can't recall that.

Q Do you recall whether the letter itself addressed any of these matters?
A Yes.

Q Did the fact that the letter, that some of the allegations in the letter appeared to involve Dr. Reuber's own activities in these controversies influence your decision to report on the letter? If you recall?
A I can't recall with -- that I did it -- I wrote a story on, the letter because the letter as a whole was newsworthy.

Q Okay. Now, I believe you have a letter in front of you, don't you still?
A Yes.

Q Somewhere on that letter there is a statement by Dr. Hanna to the effect that he has investigated the allegations against Dr. Reuber and found them to be true. Can you find that? Oh, no. It's page 1 and it's the very beginning of the third paragraph there. Do you have page 1?
A Yes.

Q The first part of the third paragraph, where Dr. Hanna's letter states the allegations which have been brought against [680] you, which I have investigated and found to be true are, et cetera?
A Yes.

Q Okay. At the time that you decided to publish an article reporting on Dr. Hanna's letter of reprimand did you have any doubt whatsoever that that statement was not true?
A I had no doubt.

Q In fact, did you assume that it was true?
A Yes.

Q Did you have any personal knowledge of any kind whatsoever that would have made -- that made you suspicious that this was a lie somehow?
A No.

MS. CHAPPELL-WHITE: I have no further questions.
THE COURT: Any other examination?
MR. BATTOCCHI: Just one.
REDIRECT EXAMINATION BY MR. BATTOCCHI:

Q Did you have any knowledge independent of this letter that any of the statements in it were true?
A No.

MR. BATTOCCHI: No further questions, Your Honor.
THE COURT: Ms. Cooper, you may step down and be excused. Mr. Foreman and ladies and gentlemen, it's just about 1:30. You may be excused until Monday morning at 10 o'clock. Over the weekend don't discuss the case with anyone or anyone [681] on the jury. Have a good weekend. Let me see counsel.

(Conference between Court and counsel, not recorded.)
(Proceedings adjourned at 1:30 p.m.)

APPENDIX H

FREDERICK CANCER RESEARCH CENTER
..... P.O. BOX B - FREDERICK, MARYLAND U.S.A. 21701 - 301 663-8000

March 26, 1981

Dr. Melvin D. Reuber
Head, Experimental Pathology/
Histotechnology Laboratory
Frederic Cancer Research Center
P.O. Box B
Frederick, MD 21701

Dear Mel:

I write this admonishment with deep concern and regret. You have acted in a most unprofessional manner, creating controversies that have both scientific and economic impact. Your mishandling of scientific data and your unrestrained interpretations of those data have negatively affected the economics of agricultural and rural communities in California and Wisconsin, as well as creating public distrust and lack of confidence in the National Cancer Institute (NCI) authorities who administer the carcinogenesis testing program.

Furthermore, you have operated under the guise of the endorsement of both NCI and the Frederick Cancer Research Center (FCRC). These obstreperous actions have had a multi-million dollar implication, giving the impression that the NCI may be administering programs of questionable competency. These actions are unfortunate; your carelessness and lack of professional expertise in dealing with these issues have seriously prevented any real technological issues from being addressed in a sound scientific manner.

The allegations which have been brought against you (which I have investigated and have found to be true) are that you

have reinterpreted slides that were part of several bioassay carcinogenicity tests including those tests associated with malathion, malaoxon, and picloram. With regard to malathion and malaoxon, your statement in a letter to Mr. Rominger, the Director of the Department of Food and Agriculture in Sacramento, California, was that your reinterpretation was based on "examination of every histological slide," (up to 24,000 slides) of the three studies. Based on this statement, and assuming that a competent pathologist would spend a minimum of five minutes per slide in order to adequately reinterpret a previous diagnosis, you spent a total of 333 days in the repository reading these slides. I have checked the repository records and you have not spent that amount of time in the repository. Therefore, I can only assume that your statement regarding your thorough evaluation of these slides was incorrect and misleading. On the other hand, you may have spent considerably less time per slide, thus raising a question of whether your interpretation is scientifically valid.

Furthermore, you have through speeches, telephone calls, and reports, challenged the competency of the tests and the associated pathologists. In the case of malathion and malaoxon your stand has questioned the competency of the pathologists at the Gulf South Research Institute in New Iberia, Louisiana, who were under contract with the National Cancer Institute. You have accomplished this tact through excessive time away from your work at the FCRC. While through evening and weekend work, your pathology responsibilities at the Center have not suffered from this

effort, you have abused a professional courtesy extended to you both by the Frederick Cancer Research Center and the National Cancer Institute. Your scientific communications and publications were not reviewed through the established system of the National Cancer Institute and the Cancer Center, since in your own words you believed the papers would, "not have gotten through the system." I can only assume this statement to mean that you knew your comments would not have passed critical scientific review and evaluation. You nevertheless used these materials to create a political and economic controversy to the discredit of the NCI Carcinogenesis Testing Program, and misrepresented the publications as having the endorsement of both the NCI and the contractor of FCRC, Litton Bionetics, Inc.

I find this to be the most flagrant professional abuse that I have ever experienced in my scientific and administrative career. You have violated a signed employment agreement that you had with the FCRC when you joined the staff, acknowledging that you would adhere to the publication policies as well as all other policies. Your blatant disregard for these agreements is grounds for immediate termination. I will not use this administrative prerogative, however, because due to the sensitivity of the issues, your termination could be easily misinterpreted: the public confidence in scientists and scientific procedures for communications of results is a valuable and cherished trust. When scientists abuse and misrepresent this trust for whatever reasons, sincere or insincere, I feel it must be dealt with internally rather than simply excised, possibly to return at a later time.

Therefore, this is simply a warning, yet a very firm warning, that as of now you are not to use compensatory time away from the laboratory for any purpose unless it is cleared by

me. Furthermore, all publications that you are associated with are to adhere to the rigid policy of internal scientific review and clearance through my office and through the National Cancer Institute administrative offices. Any divergence from either of these policies or any other policies associated with the FCRC, and any reduction in your present work effort will be grounds for immediate termination from the Frederick Cancer Research Center. This regrettable situation has been created by your arrogant lack of concern for scientific and administrative policies at the Center and at the National Cancer Institute. You exploited the privilege of scientific communication in an unrestrained manner. You have pontificated and criticized other scientists in a manner that excited the public in areas of immediate national concern. Rather than using the forum accepted by scientists, you have used an unreviewed forum to gain easy and immediate voice to the media where public health issues are most easily sensationalized. You may be correct in your interpretations, but the rest of the scientific community, and the public, has not had the advantage or privilege of learning and evaluating your view since you declined to

pass it through the standard review procedure established for this purpose. Therefore, neither the scientific community nor the public has adequately benefited from your important information and viewpoint. This is counterproductive at all levels.

You are a good pathologist and have a lot to offer the

carcinogenesis testing program. My goal is to harness your efforts in a meaningful manner and direct them such that the taxpayer benefits from your expertise, rather than becoming excited or biased by your misuse of your position and your credentials. I am not interested in thwarting your efforts on behalf of public concern for environmentally mediated health problems, but rather, espouse to channel these efforts in a legitimate manner that will gain the respect and support of all parties concerned.

Sincerely yours,

M. G. Hanna, Jr., Ph.D.
Director, FCRC

MGH/jm

APPENDIX I

PESTICIDE & TOXIC CHEMICAL NEWS

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GENERAL

DR. MEL REUBER CENSURED by cancer research center head for "unprofessional" conduct, misinterpreting data. Page 22

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DR. MEL REUBER, PATHOLOGIST, GETS SHARP CENSURE, WARNING FROM HIS SUPERIOR

Dr. Melvin D. Reuber, a pathologist repeatedly involved with pesticide carcinogenicity studies and interpretation of study results and slides, has been censured by his

supervisor for general unprofessional conduct and charged with specific "obstreperous actions (which) have had a multi-million dollar implication, giving the impression that the NCI (National Cancer Institute) may be administering programs of questionable competency."

"These actions are unfortunate; your carelessness and lack of professional expertise in dealing with these issues have seriously prevented any real technological issues from being addressed in a sound scientific manner," the "admonishment" to Dr. Reuber from Dr. M. G. Hanna, Jr., Director of the Frederick Cancer Research Center (FCRC), charged. FCRC is operated for NCI by Litton Bionetics, Inc. Dr. Reuber is Head, Experimental Pathology/Histotechnology Laboratory, FCRC (See Jan. 10, 1979, Page 7).

"Obstreperous actions" and specific charges levied against Dr. Reuber by Dr. Hanna included: Mishandling and unrestrained interpretations of scientific data which in part created "public distrust and lack of confidence in the National Cancer Institute (NCI) authorities who administer the carcinogenesis testing program;" operating under the "guise of the endorsement" of NCI and FCRA; and disputing the competency of tests and the pathologists associated with them. Dr. Hanna's letter to Dr. Reuber stated:

"The allegations which have been brought against you (which I have investigated and have found to be true) are that you have reinterpreted slides that were part of several biooassay carcinogenicity tests including those tests associated with malathion, malaoxon, and picloram. With regard to malathion and malaoxon, your statement in a letter to Mr. Rominger, the Director of the Department of

Food and Agriculture in Sacramento, California, was that your reinterpretation was based on "examination of every histological slide," (up to 24,000 slides) of the three studies. Based on this statement, and assuming that a competent pathologist would spend a minimum of five minutes per slide in order to adequately reinterpret a previous diagnosis, you spent a total of 333 days in the repository reading these slides. I have checked the repository records and you have not spent that amount of time in the repository. Therefore, I can only assume that your statement regarding your thorough evaluation of these slides was incorrect and misleading. On the other hand, you may have spent considerably less time per slide, thus raising a question of whether your interpretation is scientifically valid."

Dr. Hanna said he was giving Dr. Reuber a "very firm warning" rather than terminating him even though grounds to do so were apparent. A particular ground was that Dr. Reuber's scientific communications and publications were not reviewed through the NCI system, since in your own words, Dr. Hanna noted, the papers would 'not have gotten through the system.' I can only assume this statement to mean that you knew your comments would not have passed critical scientific review and evaluation. You nevertheless used these materials to create a political and economic controversy to the discredit of the NCI Carcinogenesis Testing Program, and misrepresented the publications as having the endorsement of both the NCI and the contractor of FCRC, Litton Bionetics, Inc." The letter to Dr. Reuber continued:

"I find this to be the most flagrant professional absue that I have every experienced in my scientific and administrative career. You have violated a signed employment agreement that you had with FCRC when you joined the staff, acknowledging that you would adhere to the publication policies as well as all other policies. Your blatant disregard for these agreements is grounds for immediate termination. I will not use this administrative perogative, however, because due to the sensitivity of the issues, your termination could be easily misinterpreted: the public confidence in scientists and scientific procedures for communications of results is a valuable and cherished trust. When scientists abuse and misrepresent this trust for whatever reasons, sincere or insincere, I feel it must be dealt with internally rather than simply excised, possibly to return at a later time."

The FCRC Director specifically warned Dr. Reuber that "as of now you are not to use compensatory time away from the laboratory for any purpose unless it is cleared by me." The letter to Dr. Reuber continued:

"Furthermore, all publications that you are associated with are to adhere to the rigid policy of internal scientific review and clearance through my office and through the National Cancer Institute administrative offices. Any divergence from either of these policies or any other policies associated with the FCRC, and any reduction in your present work effort will be grounds for immediate termination from the Frederick Cancer Research Center. This regrettable situation has been created by your arrogant lack of concern for scientific and administrative policies at the Center and

at the National Cancer Institute. You exploited the privilege of scientific communication in an unrestrained manner. You have pontificated and criticized other scientists in a manner that excited the public in areas of immediate national concern. Rather than using the forum accepted by scientists, you have used an unreviewed forum to gain easy and immediate voice to the media where public health issues are most easily sensationalized. You may be correct in your interpretations, but the rest of the scientific community, and the public, has not had the advantage or privilege of learning and evaluating your view since you declined to pass it through the standard review procedure established for this purpose. Therefore, neither the scientific community nor the public has adequately benefited from your important information and viewpoint. This is counterproductive at all levels.

"You are a good pathologist and have a lot to offer the carcinogenesis testing program. My goal is to harness your efforts in a meaningful manner and direct them such that the taxpayer benefits from your expertise, rather than becoming excited or biased by your misuse of your position and your credentials ... I am not interested in thwarting your efforts on behalf of public concern for environmentally mediated health problems, but rather, espouse to channel these efforts in a legitimate manner that will gain the respect and support of all parties concerned."

According to the letter, Dr. Reuber's stand on malathion and malaoxon challenged and question the competency of pathologists at the Gulf South Research Institute, New Iberia, La., who were under contract to NCI.